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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession. and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

WITH this issue of the Journal the Association is really beginning a new year of activity without the benefit of the inspiration and enthusiasm that have been every year generated by the annual meeting. Our Association has had excellent meetings in the past, both with respect to entertainment and accomplishment. I look forward with hope to the time when we can again meet together upon such an occasion. In the meantime your officers and Executive Committee are endeavoring to have some additional activities developed so that everyone connected with the Association may be kept interested and informed.

During the convention of the American Bar Association in Detroit your officers and Executive Committee had an informal meeting of those who were present attending the American Bar Convention. An account of this meeting prepared by your former President Oscar Brown will be found elsewhere in the Journal. We hope that the ideas developed at that conference will produce interesting results for the membership generally.

You will find in this issue reports of some of the committees appointed a year ago. All of the committees then appointed will continue in office during the current year. I wish the chairman of each committee who has not reported will make his report in time for the next issue of the Journal. I suggest that each committee chairman consult with his members and consider ideas of interest that his committee should deal with during the current year.

The officers and Executive Committmen hope that you will like the idea of our proposed news letter to be sent out during the emergency. As you realize, it will be an experiment to start with. The success of this experiment must depend upon the interest and activity of members generally in sending in items of interest about the membership. Please consider carefully this new venture and follow it up with your own suggestions and items of interest to the Secretary or the Editor of the Journal, both of whom are anxious to make a great success of this new effort.

For your information, I may advise that The Greenbrier Hotel was taken over by the Government for hospital purposes shortly after its evacuation by the aliens. It appears more convincing than ever that our decision with respect to not holding our annual meeting this year was a wise one under all of the circumstances. Let us harbor the hope that before long we can prepare for our annual convention and that in the meantime the Association's activities will appeal to every one of its members.

WILLIS SMITH,
President.

Insurance Counsel Journal

PUBLISHED QUARTERLY BY
INTERNATIONAL ASSOCIATION OF
INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor and Manager*
MASSEY BUILDING,
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The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

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VOL. IX OCTOBER, 1942 No. 4

IN MEMORIAM

George L. Naught, New York City; born November 9, 1872, died September 19, 1942. Mr. Naught was Vice President and General Counsel of the American Surety Company of New York and the New York Casualty Company. He was twice elected Vice President of the International Association of Insurance Counsel, having served in that capacity during the years 1935-1936 and 1938-1939.

William O. Reeder, St. Louis, Missouri; born July 17, 1886; died October 6, 1942; member of the firm of Sullivan, Reeder & Finley; member of Executive Committee of International Association of Insurance Counsel for the years 1934-1935 and 1940-1942.

Harvey T. Harrison, Little Rock, Arkansas; born January 6, 1884; died September 29, 1942; member of firm of Buzbee, Harrison & Wright.

Frank J. Roan, Vice President of Commercial Casualty Insurance Company, Newark, New Jersey; born July 26, 1888, died June 14, 1942.

Lt. (j.g.) George William Yancey, Jr., U. S. N. R. Birmingham, Alabama; born August 31, 1909; died July 11, 1942, San Juan, Puerto Rico; member of firm of London and Yancey.

THE JOURNAL

The War made it inexpedient to hold our annual meeting and get-together this year, and it is doubtful, of course, whether we shall be able to meet in 1943. The Journal can be made a medium through which the members may keep in close touch with one another. With the approval of your Executive Committee and with the assistance of the membership, your Editor would like to devote space in the Journal to the members, beginning with the January, 1943 issue.

In this issue a short memorial appears in memory of several of our members who have recently passed on. I am afraid that others have died and that their death has not been called to the attention of your Editor. You can be of help by sending to the Journal the name of any member who has recently died. The Journal can then give appropriate notice of death of a member to the membership. It has come to the attention of your Editor recently that the death of a member has not been known to other members—close personal friends of the deceased member—for months after his death.

* * *

MEMBERS IN SERVICE

With the assistance of the membership, a complete list of members in service, giving the rank, branch of service and mailing address, may be and should be published in the January, 1943 issue of the Journal. Your Editor feels that such a list should be published in order that the membership may be advised of their friends who are in the service, and in order that other members not in the service and those in the service may have an opportunity to correspond with one another. By furnishing the Editor with this information, the Journal can be mailed to all of our members in the Armed Forces. Letters and communications from friends mean much to men in the service who are separated from friends and home. Will you help by immediately writing to the Journal and furnishing the Editor with the name, mailing address, rank and branch of service of members who

are in the service of our Country from your state, town or community?

Obviously, such a list, which we hope to publish in the January, 1943 issue of the Journal, will not be complete or satisfactory without the cooperation of each member of the Association.

* * *

ARTICLES FOR JOURNAL

Your Editor has found it increasingly difficult to obtain suitable copy for the Journal in the form of articles. Many of our members are in the service and those who are left on the job are smothered with work, at least for the present.

If you should happen to read this, will you not consider it a personal appeal and request to you from the Editor to do the following:

First: Suggest subject for an article.

Second: Suggest the name and address of the proper man to write it. The best man may be you, so, in writing, frankly admit it.

Third: Call to the attention of the Editor any decision or decisions of the court of last resort in which you were of counsel, if you feel that the membership will be interested in the law of the case or in any other feature of the case. If you will do this, and also write a short resume of the case, it will be published in the Journal and due credit given to you. This request is directed not only to cases in which you participated and were successful, but also to such case or cases, if any, in which you might have participated and lost.

Fourth: Give specific suggestions as to how the Journal can be improved, and express your willingness to contribute to this end.

* * *

STATE COMPENSATION ACT—INTERSTATE COMMERCE BY TRUCK

A large number of the State Workmen's Compensation Acts exclude from the provisions of the Act common carriers engaged in interstate commerce and the employees of such common carriers while engaged in interstate commerce. It has been recognized for many years that employees of a railroad who receive injuries while engaged in interstate commerce are not covered by the State Act, but come under the Federal Employers Liability Act. The Federal Act specifically applies to railroad employees. In recent years many bus and truck operators have engaged in interstate commerce as common carriers and carry insurance protecting the carrier under the Workmen's Compensation Act, generally known as Section A of the policy, and also under the common law and State Employers Liability Act, known as Section B of the policy. Some insurance companies have paid compensation to the widow of an injured employee who received a fatal injury while operating a bus or truck in interstate commerce for a common carrier. On the other hand, some insurance companies take the position that the State Compensation Act does not apply and that the liability, if any, is under Section B of the insurance policy and under the common law of the State as modified by statute. Cases of interest on this subject are as follows:

> Massengale v. Tennessee River Navigation Co., 230 S.W. 785 (Tenn.); Cohen v. Schaetzel, 104 Pac. 1060; Hall v. Industrial Commission of Ohio, 3 N.E. (2d) 367; State v. Kelly, 74 Pac. (2d) 16.

The Supreme Court of Alabama in the case of Nichols v. St. Louis, etc., Railroad Company, reported in 227 Ala. 592, 151 So. 347, 90 A. L. R. 842, held that a policeman employee killed while watching interstate train not under Alabama Workmen's Compensation Act but under Federal Employers Liability Act.

In the case of Pound v. Gaulding, 237 Ala. 387, 187 So. 468, the court held that an employee injured while working for a contractor on Government properties ceded by State of Alabama to the Federal Government prior to enactment of Workmen's Compensation Act of Alabama did not come under the Alabama Act, but was entitled to proceed under the Alabama Employers Liability Act. The proceeding was not under any Federal Statute in this case.

INTOXICATAD—INTENTIONAL ACT—ACCIDENTAL MEANS

On March 19th, 1942, the Supreme Court of Alabama in the case of Continental Casualty Company v. Mae Meadows, 242 Ala. 476, 7 So. (2d) 29 (Ala. 1942), handed down a decision in which lawyers interested in health and accident litigation will read with interest. The opinion was written by Chief Justice Gardner.

In this case the company insured against loss of life through accidental means, and excluded from coverage if injury sustained while the insured was under the influence of any intoxicant, and also excluded where injury results from intentional act of insured or other person. It appears from the opinion that assured and a friend spent the afternoon with two girls in a hotel, and that deceased consumed a large quantity of liquor and was intoxicated when last seen at the hotel. Later in the afternoon insured called his friend, who had returned to her home, over the telephone and was told not to come to the house, that her husband was at home. Insured disregarded advice, entered the apartment without knocking, was confronted by the husband and told to leave, but refused to do so, showed a belligerent attitude and was shot by the husband three times in the back and side. This case was tried twice before a jury, with a verdict for the plaintiff in each instance. The trial judge set aside the first verdict for the plaintiff, but refused to set aside the second verdict.

The Supreme court held that the defendant was entitled to the affirmative charge, as the evidence showed that the insured was intoxicated, that "no normal man would have thought for a moment of courting death in such a reckless manner." The court further held that the defendant was entitled to the affirmative charge as the act was intentional. The court attached importance to the fact that there were three shots and that all reached their mark. The court expressly reserved decision on the question of death by accidental means.

COLLISION CASE OF INTEREST

A novel collision case was reported to your editor by Mr. Thomas N. Bartlett, manager Claim Division of Maryland Casualty Company. This case should be of peculiar interest to trial lawyers who devote a substantial part of their time trying cases growing out of automobile accidents. It appears that Baltimore attorneys, anticipating that litigation growing out of automobile accidents would soon reach the vanishing point, have attempted to open up a new field. Mr. Bartlett's digest of the case follows:

"No, this collision did not take place at an intersection of two streets or country roads. In fact it did not involve an automobile or truck, even though the accident was a right angle collision.

The scene of the accident was a department store. The plaintiff was a customer, walking in an aisle twelve feet wide. At intervals in the center of this aisle were display tables leaving a somewhat narrower aisle on each side of the table.

The plaintiff was walking on the side of this center aisle, had passed the last table and stepped to the center of the aisle while going to a department in front of her and to her right. She had just passed a section on her right in which a friend of hers was employed. A five foot aisle intersected the aisle in which the customer was walking. A saleslady was walking in an aisle which intersected the aisle in which the customer was walking and the customer and the saleslady bumped together. The customer fell to the floor. Right wrist was broken. There were coat hangers displaying coats bordering on the corner of the aisle, which the evidence seemed to indicate obstructed the vision of each party at the intersection.

The verdict of the jury was in favor of the defendant. (Department store). The case was tried in the Superior Court of Baltimore City, Maryland. Biggs v. Hutzler Brothers Co., Superior Court, Baltimore City, February 9, 1942."

Qualifications of An Expert Witness

By Joe G. Sweet
San Francisco, California

THERE are few rules of law more definite and salutary than those having to do with the qualification, in court, of expert witnesses. In spite of this, the true principles are little understood by most lawyers and, all too frequently, not applied by the courts. The tendency of a majority of trial judges is to permit almost any self-styled expert, to be the judge of his own qualifications, and, to mislead the Blind Goddess, if he can.

It should always be kept in mind that when a trial judge, sitting with or without a jury, passes upon the qualifications of a witness, offered as an expert upon, let us say, a question of science, he is trying a question of fact which must, if the ruling is to be favorable, be supported by some evidence. Like any other decision on facts it should be, and all too seldom is, in accordance with the weight of the evidence. Too frequently an undertrained plumber is permitted to guide the court or jury on matters that would test the abilities of a highly trained mechanical engineer.

The law with regard to the matters just mentioned is well expressed in *Vallejo etc. R. R. Co. v. Reed Orchard Co.*, 169 Cal., 545, *at 575*, in the following language—

> "The question whether or not a witness is qualified to give his opinion, as evidence upon a matter in issue, is submitted to the trial judge in the first instance, and is to be determined by him before such opinion may be given. (Fairbank v. Hughson, 58 Cal. 314.) It is, in itself, in the nature of a trial of a question of fact, by evidence addressed to the judge alone, and, as in other decisions on questions of fact by a trial court, his ruling thereon is a matter of discretion and will not be overturned on appeal unless there was an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence given on the subject. (Howland v. Oakland etc. Co., 110 Cal. 521 (42 Pac. 983); Mabry v. Randolph, 7 Cal. App. 427 (94 Pac. 403.) If there is any substantial evidence to sustain the ruling, the exception thereto will be disallowed."

And in passing upon the evidence the court must apply recognized rules of evidence. The witness' opinion of himself is not evidence upon which a finding of qualification can be based. The correct rule is well stated in *Syllabus 9—Southern Tel. & Tel. Co. v. Evans*, 116 S. W., 418.

> "The competency of a witness to testify as an expert is not determined by the estimate which he places on himself, but that which his answers show should be placed on him, and his statement that he is or is not an expert is a mere conclusion on his part."

The cases furnish ample guidance for the judge called upon to pass upon the qualifications of a proposed witness.

In *Atchison T. & S. F. R. Co. v. Mason*, 46 Pac., 31, at pages 35 and 36, the court used this language—

> "On the question of science, skill, or trade, persons of science, skill, or trade, or others, having derived a knowledge of the facts under investigation by study, or from actual observation and experience, may not only testify to facts, but are permitted to give their opinions in evidence; but, before such a person can give an opinion on the matter under inquiry, it must be shown that he possesses the necessary qualifications to give an opinion on the matter to which his attention has been called. Neither of the witnesses who testified in relation to the shrinkage of the cattle were shown to be competent to give an opinion. They were not shown to have been engaged in the business of shipping cattle themselves, or by observation and experience from frequently seeing cattle shipped, or from observing the weight of cattle before and after they were shipped. Men who have had experience as shippers, and have observed the shrinkage of cattle in shipment, and have handled cattle under similar circumstances, and observed the effect thereof on cattle, would be competent to give an opinion as to what they would shrink by handling, and by con-

finement in stock pens and in strange pastures, or in transportation; but, before they are competent to give an opinion on the subject, their knowledge of the subject must be shown. The witnesses not having been shown to possess such knowledge as made them competent to give an opinion, their testimony should not have been permitted to go to the jury."

In *Western Union Telegraph v. Coyle,* 104 Pac., 367, at 368, the opinion reads—

"Whenever it is desired to have the opinion of a witness on the subject of value, it is also necessary, whether the witness is offered as an expert or not, to lay some foundation for the introduction of his opinion, by showing that he has had the means to form an intelligent opinion, 'derived from an adequate knowledge of the nature, and kind of property in controversy, and of its value.'

'Where a witness if produced to testify, in the character of an expert, as to the value of property, it should appear that he has some special skill or experience or peculiar knowledge of the value of the class of property about which it is proposed to question him'. Rogers on Expert Testimony (2nd Ed.) Sec. 152, P. 356."

In *Soady v. Washburn,* 114 Cal. App. 82, at 83 and 84, the court stated the rule as it applies to expert witnesses in malpractice actions, in this language—

"Plaintiff concedes that the non-suit was properly granted as there was no expert testimony in the record to make out her case; but appellant contends that the trial court erred in sustaining objections to the questions asked of the witness Dr. Thompson, through whom appellant sought to introduce such testimony. In our opinion there was no error in the rulings of the trial court. In order to make out her case it was necessary for appellant to show that respondent had failed to exercise that degree of care and skill ordinarily exercised by persons engaged in the practice of respondent's profession in the locality and at the time the treatment was given. (Rankin v. Mills, 207 Cal. 438 (278 Pac. 1044); Markart v. Zeimer, 67 Cal. App. 363 (227 Pac. 683). Dr. Thompson was a retired naval officer and had never engaged in the general practice of medicine at any place. He was not and never had been licensed to practice medicine in California and had arrived in San Francisco from Honolulu only a few weeks prior to the trial. Appellant did not prove or offer to prove that the witness had any experience or had made any investigation which would qualify him as an expert on the subject of the standards of the medical profession in California or of the degree of care and skill usually exercised by members of that profession in San Francisco or in that vicinity.

Counsel for appellant state that this is a case of first impression and present no authorities to sustain their position. It is argued that the court should take judicial notice of the fact that the medical standards in San Francisco are as high as those in any place in the world. Our pride leads us to express the hope that those standards are as high as counsel claim, but we may not take judicial notice of the relative heights which the medical profession has attained in various parts of the world. The witness having testified that he had never engaged in the private practice or any other practice of medicine anywhere in California, the court properly sustained the objections on the ground that no proper foundation had been laid in the absence of some showing of the witness' special qualifications to testify regarding the standards of the medical profession in this state."

The rule is pithily put in the syllabus to *Lockridge v. Fessler,* 37 S. W., 65—

"It was error to allow witnesses to testify as experts as to the proper way for liverymen to halter and hitch horses, without showing that they had had experience in that regard."

How the rule is frequently applied in practice is shown by the decision in *Pierce v. Paterson,* 123 Pac., 2nd, 544, a case in which the writer appeared for the defendant and appellant.

Defendant was a physician in general practice in Oakland, California. He was called upon to treat a small boy who had mashed his finger in a bathroom door. He did not administer tetanus antitoxin and later the child developed tetanus and died. The mother, a widow, sued for claimed malpractice.

As the administration of the antitoxin is

attended with some danger and the administration or non-administration is a matter of medical judgment, a case could not be made for the jury unless plaintiff produced a qualified medical witness to testify whether a physician possessing and exercising the degree of skill and care ordinarily possessed and exercised by general practitioners in Oakland or a similar locality would have administered antitoxin.

The requirements are set forth in *Engelking v. Carlsen,* 13 C., 2nd, 216, as follows—

> "It is true that in a restricted class of cases the courts have applied the doctrine of res ipsa loquitur in malpractice cases. But it has only been invoked where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised."

And in *Rasmussen v. Shickle,* 4 Cal. App. 2nd, 426, at 430—

> "To qualify as such expert in a malpractice case against a physician the witness must not only show himself to possess learning and knowledge of the subject of injury sufficient to qualify him to speak with authority on the subject, but also a familiarity with the treatment and degree of care and skill of other practitioners in the locality in question, sufficient to qualify him to say whether or not the defendant's treatment was consistent with what other physicians in the exercise of reasonable care might do under similar circumstances."

It would seem to be obvious that the witness should have been possessed of two qualifications; (1) a knowledge of medicine; (2) a knowledge of the methods and treatments of other physicians in the community.

Plaintiff produced an Oakland physician and offered him as an expert. The following illustrates the testimony with regard to qualifications—

> "Mr. L. Q. You have been practicing in the City of Oakland, County of Alameda, State of California, for approximately twenty years?
>
> A. Yes sir.
>
> During that time have you become familiar with the standard of care and skill ordinarily used and exercised by physicians and surgeons practicing their profession as such in the City of Oakland, County of Alameda, State of California, during the year 1939?
>
> Mr. S. Object to upon the ground it calls for the opinion and conclusion of the witness.
>
> THE COURT. Overruled.
>
> Mr. L. Q. Answer yes or no.
>
> A. Yes sir."

Cross examination as to qualifications.

> "Q. Have you consluted with any doctor —has any doctor called you as a consultant in any tetanus case in the City of Oakland, County of Alameda?
>
> A. No.
>
> Q. Have you ever called any doctor or doctors as a consultant on tetanus cases in Alameda County?
>
> A. No.
>
> Q. Have you ever been called as a consultant by any doctor with regard to the treatment of cuts or injuries?
>
> A. No.
>
> Q. Have you ever called any doctor as a consultant?
>
> A. No, I don't have to.
>
> Q. What is the answer?
>
> A. I didn't have to."

Further cross examination.

> "Q. Well, I will put it this way: Suppose a youngster with bare knees or having stockings on either, it doesn't matter but I think most youngsters are bare-kneed these days, if that youngster falls on a path and gets a little cut in the knee, would—basing your answer upon that assumption—all doctors of the type that Mr. L described to you give that child with the cut tetanus serum?
>
> A. It all depends on the circumstances.
>
> Q. I will ask you to answer that yes or no and then you may explain it. Would all doctors do that?
>
> A. *I don't know what doctors do, no."*

The jury found for defendant, a new trial was granted, and an appeal taken from the order granting the new trial. On appeal it was urged that the case should have been ended with defendant's motion for non-suit because plaintiff's expert lacked one essential qualification—*knowledge of the practice fol-*

lowed by other physicians. The Appellate Court overruled the contention, saying—after detailing the educational acquirements of the doctor:

> "In 1920 he removed to Oakland, in Alameda County and has practiced his profession at said place ever since. *He further testified* that during all of the period of his practice in Alameda County he was familiar with the standard of care and skill ordinarily used, possessed and exercised, by physicians and surgeons practicing in Alameda County and in their treatment of wounds such as was suffered by the decedent, and of tetanus infections. Under well established rules these qualifications of Dr. Ruedy rendered him competent to testify as an expert witness."

It will readily be seen that this decision makes the witness' opinion of himself, and not the facts established by evidence, the controlling factor. A physician may be quite learned and, yet be a lone wolf unacquainted with the practices of the vicinity. He may practice a narrow specialty and know little of what men in other lines are doing. An oculist may know next to nothing of the practice of orthopedic surgeons. On the other hand, a physician may be a man of moderate abilities and still, by reading, attendance upon medical meeting, and conference with his colleagues be thoroughly informed on the practices of the community.

The evil that flows from relaxation of the rule is apparent. The purpose of a law suit should be to arrive at the truth. Science is daily placing new discoveries in our hands.

Properly presented and expounded by qualified experts, these discoveries are an invaluable guide to court and jury. Presented by the unlearned they lead to absurdity and injustice. The trial court should require substantial proof of the qualifications of the offered expert and should not hesitate to rule him off the course when evidence is lacking. A man's statement that he is an expert may tend to establish immodesty rather than learning.

Emergencies at Death

By W. H. Trentman
Vice President, Occidental Life Insurance Company, Raleigh, North Carolina

A FURNITURE factory which had been in constant operation for 52 years in the Piedmont section of North Carolina closed its doors for the first time last month. The tragedy reminded me again of the emergencies that arise at death. The owner had died. Management problems arose. Post mortem taxes and the cost of settling the estate destroyed a business of great value to the community. Most of its value to the heirs was likewise lost.

The business could have been saved for the community and the heirs by an amount of life insurance to reimburse the shrinkage in the same sense that fire insurance is necessary to reimburse the owner of property that has been destroyed by fire. I do not intend to suggest the idea that attorneys have fallen down on the job while drawing wills for their clients, or to emphasize the fact that life insurance agents have neglected their duties, but several recent incidents have impressed me with the importance of well-known, yet frequently forgotten, facts, which because of their very simplicity are too often neglected. That tragedy so frequently results because they are not considered has caused me to believe that they might again be worthy of a few minutes thought. That the subject is trite to insurance counsel representing the insurance industry does not lessen its importance.

Life insurance, like fire insurance, serves the purpose of property insurance — of insurance protecting accumulations already made. In a case of fire insurance only one building in a hundred ever suffers from fire. The average loss in a well protected city probably does not exceed fifteen per cent and the hazard pertains only to property that will burn.

But, the death hazard as the cause of property shrinkage occurs to one out of every three owners before the age of sixty-five is reached.

The death hazard affects not only a portion but all the property in the estate and the average loss is well in excess of fifteen per cent. Under such circumstances does it not seem strange that owners of estates and legal advisors do not more readily avail themselves of the service of life insurance as property protection? I am aware of the fact that clients usually know, or think they know, how they want their property divided when they die and you know that few of them intelligently consider the many emergencies that will arise upon their death. By failing to more carefully consider them are we not all guilty of neglect?

Because of indebtedness and other causes with which you are familiar the average estate is usually in more or less of a mess at the time of the death of the owner. A successful attorney who had built a large estate recently died. His estate consisted in part of business properties, corporation stock, and largely of good will dependent upon his continued activity. At his death the money value of this good will disappeared entirely. Is the thought too far-fetched to think that he could have reasoned:

"Good will is a real value but I am willing to lose it the moment I die." Or, did he simply fail to think of its value?

The heavy shrinkage of his estate could have been avoided—easily avoided—by placing an appraised value upon his good will and then capitalizing it against loss through death by life insurance.

There are many professional men as well as business men who through thoughtlessness fail to protect their intangible investments. Just as a tree must be planted, cared for, and allowed to grow before it can bear fruit so must the average man make intangible investments in training and good will building. If the owner lives the investment may become fruitful. But, if the owner dies and the investment thus fails, the life insurance proceeds will reimburse the estate.

As far as the money value of such expenditures is concerned, possibly one-third of all business enterprises require life insurance for this particular purpose and at least two-thirds of the professional men could "safe guard" their intangible investments with life insurance.

When a man borrows money upon real property the mortgagee insists upon fire insurance equal to the value of the house. It has been estimated that probably sixteen million fire insurance mortgagee clauses are outstanding. Why should we think only of the mortgagee's interest? Should not the mortgagor be just as important a party to the arrangement? Should not the mortgagor be just as anxious for the fulfillment of his obligation as the mortagee is to have it fulfilled?

Just as the mortgagee insists upon fire insurance, so the mortgagor might insist upon life insurance to pay the debt in event of his premature death.

Thus, the life insurance would liquidate the mortgage and avoid the shifting of the obligation to dependent members of the mortgagor's family. "How true," you say and yet seldom is the truth acted upon.

That the average attorney usually represents the mortgagee, emphasizing him in terms of fire and marine insurance, may be the reason that the debt-paying power of the mortgagor so frequently goes unprotected.

My point here is that the sixteen million mortgagors need representation, which they seldom seek, so that they will be insured against loss. As regards *his* estate the mortgagor is *the* security behind the mortgage.

But, of course, mortgages are not the only obligation upon a man's estate.

Financial endorsements are also often assumed—likewise surety obligations. These are real liabilities and are so regarded by all creditors when listing the assets and liabilities of their borrowers.

A contractor in my home state died late in 1941 with his entire estate jeopardized by contractual commitments extending over many months. Fortunately it was found that his bonding company which guaranteed the completion of his contracts had caused him to purchase life insurance payable directly to the bonding company. Yet his case was unusual because of the fact that his obligations were covered.

I am told that legal advisers usually insist upon the listing of bequests in the order of their importance so that it may be known which bequests should first be complied with, the balance remaining unfulfilled in the event of a stortage in available assets.

This is probably because most makers of wills probably overlook the changing circumstances affecting values they bequeath. (During the last depression about one-fifth of the industries listed with Dun and Bradstreet Commercial Agencies passed into insolvency.

At least one-half of all estates in America were cut in two in their dollar valuation.)

The makers of wills make cash bequests in 1942, forgetting that the values may not be there in 1945. How much trouble would be saved if they would only remember that life insurance, due to its dependable solvency, may serve as a supplement to the property increasing the dollar assets available for the meeting of specific bequests. In addition life insurance proceeds, because of their prompt availability, are unusually serviceable in affecting a prompt settlement of the will. A testator may die when real estate and security values are half what they were when the will was made but debts, settlement costs, and post mortem taxes must be paid.

The executor is frantic. He knows not what to do. Should he sell bonds or stocks or real estate? Values are low but there is every reason to believe they will recover. There is an absence of cash funds such as life insurance would furnish. What a tragedy that he must sacrifice assets at low prices. He has every reason to believe that real estate values will also increase. But, sell he must in order to raise cash. The estate suffers a heavy loss, much of which could have been avoided by life insurance.

Trouble is often found where property units have been bequeathed to several heirs who can't agree to its management or liquidation. How costly and wasteful this is was noticed in the furniture factory above mentioned.

The owner had wished to be fair to all of his heirs and his estate consisted primarily of one unit. He did not wish to limit his bequests to any of his heirs by way of discrimination. Yet, he is bound to have known that certain heirs were better qualified to be entrusted with control of the property than others. He must have known of the taxes which would fall due — but he did nothing about it.

Of all sad words of tongue or pen — the saddest ones—"It might have been . . ."

He could have made an adjustment by means of life insurance. He could have avoided or eliminated all quarrels by setting forth the entire arrangement in his will explaining that full and equitable settlement was made with certain of the heirs through life insurance proceeds and that there was no disinheritance. At the time of making his will he was in good health and amply able to have provided adequate insurance for taxes and expenses—but no one suggested that he do so—no one thought the simple thoughts and—the business was ruined.

Who's It?

By Benj. Brooks
General Attorney, American Mutual Liabilit y Insurance Company, Boston, Massachusetts

ON the 3d of February, 1942, John Jones operates his truck, repeatedly, over an earthen public sidewalk, as he transports material to and from a building job. As a result of those operations, ruts are formed in the sidewalk. Jones has no insurance applying to the use of his truck on February 3d, but buys from Company A a National Automobile Liability policy which becomes effective at 12:01 A. M., February 4th, and applies to the use of the aforesaid truck and containing limits of $10,000 and $20,000.

That policy terminates by cancellation at 12:01 A. M. on February 10th and a similar policy issued to Jones by Company B contains a description of that truck and becomes effective at 12:01 A. M. on February 10th.

On the afternoon of February 9th, a pedestrian accidentally trips in one of those ruts and in falling sustains an injury. He is rushed immediately to a hospital and his death occurs immediately after he is admitted.

The identity of the deceased is not discovered for some considerable time thereafter but, in the complaint contained in the death damage action brought against Jones, it is alleged that the accident which caused the death occurred on or about 3 P. M., February 10th, 1942.

Jones has had no knowledge of the injury until the suit papers are served on him. He reads his Company B policy and immediately goes to Company B to deliver to it those papers. While Jones waits for Company B to make its decision as to whether or not it will defend the suit, Company B learns from

the hospital intern and a nurse at the hospital and from the hospital records and the City records, that the death occurred, without doubt, on February 9th. Company B then tells Jones that its policy did not require it to defend the suit but that the policy of Company A which was in effect when the accident occurred required Company A to defend.

Jones then takes the papers to Company A and gives the latter full information as respects the facts of the case. Company A refuses to defend, claiming that allegations are determinative of a defense obligation and that in any event it would not be obligated to defend a suit other than one caused by the operation of the truck during the policy period.

There results a default judgment for $10,000 and Jones satisfies the execution on that judgment.

Jones then sues both Company A and Company B for the amount expended by him in satisfaction of the execution.

Company B, in its defense, argues that it had no obligation to defend Jones. It claims that the defense obligation as contained in the policy required it to defend only suits in which the injury was alleged was "such injury" as would require the insurer to satisfy a resulting judgment. What would "such injury" consist of? and how sustained? It must be a bodily injury or its resulting death or the consequential cost of care and loss of services caused by accident occurring during the policy period and arising out of the use of the described automobile. As the accident did not occur within the effective period of the policy which it had issued to Jones, it was not "such injury"; the words "alleging such injury" cannot, grammatically, be given the meaning which would be obtained by the words "alleging that the injury is such injury."

An analysis of the wording of subsection (b) of the defense provision of the policy would seem to clearly dispose of a claim that it was the intent of the insurer to defend a case in which it would not be obliged to satisfy a portion, at least, of a resulting judgment. If it was the intent of the insurer to defend a case in which no judgment satisfaction would be its obligation, why the words "all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon"? What might be the limit of the company's liability *thereon* if only a defense obligation existed? That it is fact rather than allegation that produces the obligation is well set forth in the opinion in the case of *Hardware Mutual v. Hilderbrandt*, 119 F. (2d) 291.

Company A argues as follows: The policy applied only to an injury caused by the use during the policy period of the automobile which is described in the policy.

The judge was, for many years, professor of English in one of the leading colleges of the United States, and Jones had called his attention to the fact that the policy applied to an injury caused by accident occurring during the policy period "and arising out of the ownership, maintenance or use of the automobile" and he then cited the opinion of the Massachusetts Supreme Court in the case of *Mullen vs. Hartford Accident & Indemnity Co.*, 287 Mass. 262, in which case the syllabus reads:

> "Where, through the negligence of the owner of a motor vehicle parked on a public way, oil leaked out of a crack in the crank case onto the way, and, after the owner had driven the vehicle away, a pedestrian sustained personal injuries through slipping upon the oil and falling, such injuries were 'bodily injuries . . . arising out of the ownership, operation, maintenance, control or use' of the vehicle on the way within the meaning of a policy of compulsory motor vehicle liability insurance issued to the owner; distinguishing *Caron v. American Motorists Ins. Co.*, 277 Mass. 156."

The attention of the judge was then directed to the fact that there is not contained in the policy any limitation as respects the time within which such "ownership, maintenance or use of the automobile" must occur.

The judge is not going to be handicapped by any opinion which has not given correct value to the grammatical interpretation of words as taught by him, nor is he going to be influenced by the fact that insurance companies, for competitive or business reasons, have for years assumed defenses because of the claim that the words "alleging such injury" mean the same as the words "alleging that the injury is such injury." Those qualities in the judge give us the answer to the title question.

Wilful Act As a Defense Under Liability Policy

By Stevens T. Mason
Detroit, Michigan

IN the April 1938 edition of the Insurance Counsel Journal Mr. Harvey E. White of Norfolk, Virginia wrote a very scholarly article on this subject. Since then we have had the benefit of many cases; and, although these cases concur in Mr. White's opinion, much further light has been thrown on the subject.

Liability policies, both automobile and public liability, indemnify the assured against loss from liability for injuries resulting from accident. The question immediately arises whether the injury for which the assured is liable to the injured party resulted from such a wilful act on his part as to place the whole circumstance outside the scope of the policy.

The first thing to examine is the wilful act. It must be remembered that it is not every wilful act that would release the liability policy.

Practically every accident we are asked to defend involves some wilful act. Our automobile statutes have so covered the field that liability of an owner of an automobile to an injured party can seldom if ever be incurred without some fault that is also a crime. Cases of speed violation, driving without lights or without brakes, wilful and intentional misconduct under statutes, also reckless driving, are all wilful and intentional. In such cases the violation may have been intentional and an accident may result, but it could not then be said that the assured intended to cause the injury. Thus the assured has not placed himself outside the policy terms.

We must also carefully distinguish between intentional injuries caused by a party for whose act the assured may be responsible, and injuries caused by the assured himself.

This distinction has been pointed out in a number of cases where policies have been held to cover the assured for bodily injuries resulting from intentional and deliberate assaults committed by employees of the assured. In all of these cases the courts have stressed the fact that the assault was committed by an employee and not by the assured himself, or with the sanction or approval of the assured, and have strongly intimated that had the assault been committed by the assured himself, or with his sanction or approval, the recovery would have been denied on the ground of public policy.

The leading case of this type is Georgia Casualty Co. v. Alden Mills, 127 So. 555. In this case a foreman of the appellee committed an assault upon one of its employees. The employee recovered judgment. The appellant had issued a public liability policy to the appellee indemnifying it against liability for injuries accidentally suffered. The insurance company declined to defend the suit or pay the judgment recovered on the ground that said injuries were not accidentally suffered within the meaning of the policy. The court while holding that said injuries were accidentally suffered for the reason, among others, that the assault was not committed by the assured itself but by an agent thereof, strongly implied that if the assault had been committed by the assured or with its sanction or approval recovery would have been denied. In the course of its opinion on this branch of the case the court said:

> "In considering this question it must be borne in mind that appellee did not itself commit the unlawful assault upon Pendergraft although it was responsible therefor, because it was committed by its agent within the scope of his authority*****. The evidence in that case (the tort action) showed that appellee had no part in the assault on Pendergraft, it neither authorized nor sanctioned it—it took place without appellee's knowledge or consent. It was therefore an assault committed by an agent and not participated in by the principal. The question is, can a principal protect himself from such unlawful acts by his agent? The policies themselves are valid on their face. They do not expressly undertake to indemnify appellee against its own unlawful acts. It is true that a policy indemnifying the insured against damages because of the violation of criminal laws is void. But where a policy is legal on its face and does not undertake to indemnify the insured against the consequences of his own illegal acts it is not void because its effect is to indemnify the in-

sured against the consequences of illegal or criminal acts of others without participation on the part of the insured."

Again in *Taxicab Motor Company v. Pacific Coast Casualty Co.*, 73 Wash. 639, the court said:

"The only question that is open to the appellant therefore is whether such a contract is void as against public policy. Answering this question we are clear that the contract is not so void. Undoubtedly a contract indemnifying another against consequences arising from wilful violations of a statute or from the commission of crime generally, committed by the assured himself, is void for the reason given, but one may lawfully insure another against the consequences of such acts committed by his servants and employees, if such acts are not directed by or participated in by the assured."

Similarly in Florabell Amusement Co. v. Standard Surety & Casualty Co., 9 N.Y.S. 2d 962, defendant had issued to plaintiff a public liability policy indemnifying it against bodily injuries accidentally suffered by persons other than employees on the theatre premises of the insured. A patron of the theatre was assaulted by the manager of the plaintiff. The insurance company refused to defend on the ground that the injuries so suffered were not accidental within the meaning of the policy. The plaintiff engaged counsel and defended the suit which resulted in a verdict in its favor. It then sued defendant to recover the cost of defense. In this suit it was stipulated that the assault "was in no wise at the time authorized, consented to, participated in or ratified by the plaintiff or any officer, director or stockholder thereof."

The court while holding for the plaintiff because the assault was committed by an employee and not by the plaintiff itself or with its sanction or approval said:

"It is said that assaults are wilful and that the policy is not intended to shield the assured as to wilful acts. That appears to be true insofar as the reference is to assaults actually committed by an assured or committed by the direction or with the connivance of the assured, *Sontag v. Galer*, 279 Mass. 309. But an assault by an employee, an assault not foreseen by the employer, may be as catastrophic to the purse of the assured, the employer, as it is to the body of the person assaulted. Not being wilful on the part of the assured it is from the point of view of the assured in the nature of an accident in the course of his business."

See also *C. J. Allbrecht Co. v. Fid. & Cas. Co.*, 289 Ill. App. 508.

This rule must not be confused with cases where the insurance is for the benefit of the injured person, such as in Workmen's Compensation or Compulsory Automobile Insurance. This is well illustrated in *Wheeler v. O'Connell*, 9 N.E. 2d 544; 111 A.L.R. 1038, where the Massachusetts Supreme Court said:

"The insurance company further contends that since a policy indemnifying an assured against liability due to his wilful wrong is void as against public policy the court should not construe the statute as covering injuries due to wilful conduct. *Such is undoubtedly the rule applicable to ordinary insurance.****** The statute itself is declaratory of public policy applicable to compulsory insurance and supersedes any rule of public policy which obtains in ordinary insurance losses."

See also *Green Bus Lines v. Ocean Acc't. & Guar. Corp.* (N.Y.), 39 N.E. 2d 251.

In the case of *Rothman v. Metropolitan Cas. Ins. Co.*, 16 N.E. 2d 417; 117 A.L.R. 1069 the Ohio Supreme Court held that a judgment creditor is not precluded from recovering from an insurance company although the original action and judgment were based upon the claim of wanton misconduct. No intent or purpose to cause injury having been shown.

This case was followed by a Federal case, which went to the Sixth Circuit from Ohio, *Cordon v. Indemnity Ins. Co.*, 123 Fed. 2d 363, holding that "the state of the will of the person by whose agency the injury is caused rather than that of the injured person, determines whether the injury is accidental." This is true when the assured is the wrongdoer, but in citing this case outside of Ohio, great care should be exercised, because the case is based on the rule in *Commonwealth Casualty Co. v. Headers*, 161 N.E. 278, in which the court said this:

"Surely no one would claim that a party holding an ordinary accident insurance policy covering all forms of external accidental injuries could recover under such a policy damages sustained by reason of a wilful and intentional injury inflicted by another."

This is not the rule in many states. It is usually held that when an assured under personal accident policy suffers injury at the hands of another he may recover under his policy. *Furbush v. Maryland Cas. Co.*, 131 Mich. 234. *International Asso. v. Lester*, 257 Fed. 225. The theory is that so far as the assured is concerned the injury he suffered was an accident.

There appear to be only two universally dependable cases which deal with the question of injuries deliberately and intentionally inflicted by the assured himself. One is the case of *Sontag v. Galer*, 279 Mass. 309; 181 N. E. 182, cited by Mr. White. The other is a more recent case of *Jackson v. Maryland Cas. Co.* (N.C.), 193 N. E. 703. In that case Jackson recovered a verdict against one Pearson, who was the owner of a bus insured under a policy of automobile liability insurance. The complaint in Jackson's action against Pearson charged injuries intentionally and purposely inflicted by Pearson.

The Supreme Court of North Carolina in denying recovery upon the ground that the complaint charged and the evidence showed that the injuries were intentional said:

"The policy of insurance sued on did not cover the liability of the named insured, or that of any other person embraced within its terms, for a wilful or intentional injury.***** While ordinarily a liability insurer would not be permitted to set up as a defense to an action based upon an unpaid judgment rendered against the insured on account of the negligent operation of the automobile referred to in the policy that the injury was intentionally inflicted, that rule would not apply when the original complaint alleges as the cause of the action a wilful or intentional injury and the evidence of the plaintiff shows that the injury was intentionally inflicted by the assured. The verdict should be interpreted in the light of the allegations of the complaint and the testimony at the trial.*****"

From a study of these cases and the annotation in 111 A.L.R. 1043 and 117 A.L.R. 1175 we reach the following conclusions:

The injured party is not insured by the policy, and unless it is a statutory policy he has no rights therein. Therefore, his only right is a right of garnishment, and his rights must necessarily be dependent upon the insured's rights. That is the whole theory of garnishment. There must be an indebtedness from the insurance company to the assured in order to create a fund subject to garnishment.

The real question then is whether the assured could have recovered from the insurance company. The policy does not protect the assured from his own intentional wrong. The assured cannot reap the fruits of his own aggression. We must not be confused by the argument that was made in *Sontag v. Galer*, supra, that an injury is accidentally sustained merely because it may be accidental from the standpoint of the injured party. This may be the rule in personal accident policies but it only serves to emphasize the rule in liability policies where the assured is the aggressor that *the policy like any other contract must be construed from the standpoint of the parties thereto.*

It is easy to confuse these cases but the above cardinal principles must be stressed.

1. That the rights of the injured party are dependent upon the rights of the insured. If the insured has no rights under the policy the injured party has none.
2. The assured may have rights if he is not himself the aggressor, but if the injuries are solely the result of the intentional act of the assured himself the injuries are not bodily injuries suffered as a result of an accident within the meaning of the policy.

Effect of Repair Requirements of Housing Laws Upon The Common Law Liability of Landlords

By Thomas E. Lipscomb
Cleveland, Ohio

THE rapid growth of urban communities which began with the turn of the century resulted in many serious problems arising with respect to housing and sanitation in the overly populous cities. In an attempt to remedy the bad housing conditions existing in their cities several states enacted regulatory statutes generally referred to as housing laws. These enactments have in the main been concerned with multiple dwellings such as apartment buildings, tenements and lodging houses, but in some instances the statutes have also included single family dwellings. A common requirement found in all of the statutes is that buildings inhabited as dwellings shall be kept in good repair. The mandates of the statutes are largely directed to the owner of the property and most of the statutes provide for the assessment of a fine or penalty in case of violation.

Inasmuch as the landlord under common law owed little or no obligation to maintain the demised premises in good repair, the question naturally arises whether the provisions of these housing laws have enlarged the landlord's common law duties owed to tenants and their invitees.

The first of these housing laws was enacted in the State of New York in 1901. Strange to say, however, the important question as to their effect upon the rules of common law did not come before a court of last resort until after the lapse of almost twenty years. Obviously, if the statutory injunction upon a landlord to keep the demised premises in good repair became by implication a part of the contract of letting, then the landlord's common law immunity from liability for injuries to tenants and their invitees resulting from dangerous conditions existing within the demised premises, had been completely erased and a brand new field for the recovery of damages had been opened up. Why this possible new field for fruitful litigation was overlooked by enterprising lawyers for more than twenty years is difficult to understand. Particulary is this oversight hard to comprehend when the fact is taken into consideration that many states follow the rule that the violation of a statute constitues negligence per se, and in many other states the violation is considered as evidence of negligence.

The effect of these statutes has been passed upon by the courts of last resort in six or seven states, including Massachusetts, New York and Connecticut. The decisions are in hopeless conflict. Some hold that the statutes have enlarged the common law duties and resulting liabilities of the landlord, whereas the decisions of other states passing upon identical statutes have held that the common law duties of the landlord have not been affected by the statutes. While it seems impossible to reconcile the decisions or to formulate any precise rules for guidance in approaching the question in a new jurisdiction, it is nevertheless thought that a review of the decisions might be of interest to casualty underwriters and their counsel. It is possible for the question to arise at any time in the courts of a state not yet having ruled on the subject as it did recently in Ohio with respect to the housing ordinance of a municipality, which ordinance had been in existence for more than thirty years. See *Tair v. Rock Investment Co.*, (1942) 139 Ohio St. 629, 41 N.E. 2d 867.

Although New York was the first state to enact a housing law, the first court of last resort to pass upon the question was the Supreme Court of Massachusetts. In 1907 the Massachusetts legislature enacted a statute regulating the construction and maintenance of buildings in the City of Boston (Sts. 1907, Ch. 550, Sec. 127):

> "Every structure and part thereof and appurtenant thereto shall be maintained in such repair as not to be dangerous. The owner shall be responsible for all buildings and structures."

In *Palmigiani v. D'Argenio*, (1920) 234 Mass. 434, 125 N.E. 592, the plaintiff, a tenant in an apartment building, sued the owner for personal injuries sustained as a result of falling upon a stairway which was claimed to have been in bad repair. The stair-

way in question was in a portion of the premises which had been demised to the tenant and which was not under the control of the landlord. It was the contention of the plaintiff that the above quoted statute had changed the common law rule. The Court held, however, that there was nothing in the Housing Act which indicated an intention on the part of the legislature to change the contractual obligations between landlord and tenant as they existed at common law.

Page 592 of the Northeastern Reporter:

> "It is plain that there is no express repeal of the rule at common law relating to contracts creating a tenancy at will, under which no liability is imposed on the land owner for obvious defects, or for want of repair, unless he contracts to keep the premises in a safe condition, and to make suitable repairs during the tenancy. *** The statute not having attempted to regulate or modify the contractual relations of the parties it should not be broadened, or a construction adopted by implication which would materially limit the rights of the parties to enter into such lawful contracts as they please. It would be going far to say that the Legislature intended to do away with fundamental law."

The New York Tenement House Act, now known as the Multiple Housing Law, which provides that "every tenement house and all parts thereof shall be kept in good repair" was enacted in 1901. (Consolidated Laws, Ch. 61, Sec. 102). Apparently this statute remained on the books for approximately twenty years before anyone became aware of the fact that it may have subjected the landlord to a liability not theretofore existing. In 1922, however, the question was squarely presented to the New York Court of Appeals in the case of *Altz v. Leiberson,* 223 N.Y. 16, 134 N.E. 703. In an opinion by the late Mr. Justice Cardozo the Court held that the statute did have the effect of changing the common law rule by making the landlord liable to respond in damages for injuries proximately resulting from his failure to repair after due notice had been given.

Page 704 of the Northeastern Reporter:

> "The comphehensive sweep of this enactment admits of no exception. We are not at liberty to confine it to those parts of the building not included within the premises demised. The legislature has said that the duty shall extend, not only to some parts, but to all. Apter words could hardly have been chosen wherewith to exclude division of responsibility between one part and another. The command of the statute, directed, as it plainly is, against the owner (cf. sections 76, 103, 104, 140), has thus changed the ancient rule. Whether 'owner' may mean at times a lessee of the whole building (section 140) is a question not before us. No doubt, before a right of action will accrue in favor of the tenant, there must be notice, actual or constructive, of the defect to be repaired. No doubt the defect itself must be one that has relation to the maintenance of the building as a tenantable habitation. This limitation results by implication from the context of the section, which forms part of an article entitled 'sanitary provisions.' The meaning is that the premises shall not be suffered to fall into decay. The duty to prevent this, which, in part at least, once rested upon the tenant, is now cast upon another."

Although the *Palmigiani* case had been decided by the Supreme Court of Massachusetts prior to the decision of the New York Court of Appeals in the *Altz* case, no effort was made by Judge Cardozo to distinguish the Massachusetts decision. In fact, the decision is not mentioned in his opinion.

Approximately ten years later the same question was presented to the Supreme Court of Connecticut in connection with a similar provision of the Tenement House Act of that state. The Connecticut statute is pratically a verbatim copy of the New York Act:

> "Each building used as a tenement, lodging or boarding house, and all parts thereof, shall be kept in good repair." (General Sts. Conn., 1930, Ch. 143, Sec. 2563).

The Connecticut court took cognizance of the sharp conflict between the Massachusetts and New York decisions and definitely rejected the rule announced by the New York court in favor of the Massachusetts rule, holding that it was not the intention of the legislature to change long existing rules of common law by greatly extending the obligation of a landlord.

Page 914 of the Atlantic Reporter:

"At common law in the absence of some agreement, there is no obligation upon a landlord to make repairs upon leased property or to keep it in safe condition.*** If the plaintiff has a right to recover it must be because the legislature in the statute in question intended to change this common law rule and to make a very important and far reaching extension of the obligation of a landlord. That the statute was not intended to have such an effect is apparent from the decisions cited, all but two of which involved causes of action arising after it was originally enacted. We would hesitate to attribute to the legislature an intent to make such a drastic change in the established relationships of landlord and tenant unless the statute clearly evinced such an intent."

The New York statute was also copied practically verbatim in the Housing Act of both Michigan and Iowa, except that the scope of the statute was enlarged so as to include all dwellings. The Michigan statute (Ann. Sts. 1936, Sec. 5.2843) reads:

"Every dwelling and all the parts thereof shall be kept in good repair by the owner, and the roof shall be kept so as not to leak, and all rain water shall be so drained and conveyed therefrom as not to cause dampness in the walls or ceilings."

The language of the Iowa statute is identical with that of Michigan but notwithstanding this fact the decisions of the respective states are in direct conflict. In *Annis v. Britton,* (1925) 232 Mich. 291, 205 N.W. 128, the Supreme Court of Michigan held that the tenant of a dwelling house who sustained injuries as the result of the collapse of a broken railing around a porch, which railing the landlord had negligently failed to repair, was permitted to recover damages from the landlord for the injuries so sustained. The Court based its decision upon the rule that the failure by the owner to perform a duty specifically enjoined by statute constituted negligence per se. On the other hand, the Supreme Court of Iowa in the case of *Johnson v. Carter,* (1934) 218 Iowa 587, 255 N.W. 864, after reviewing the conflicting decisions in Massachusetts, New York and Michigan, selected the Massachusetts rule as being the sounder view. Recovery from the landlord was therefore denied to the wife of a tenant of a dwelling house for injuries sustained by her as the result of the collapse of a wall of the dwelling house which the landlord had negligently failed to repair.

Page 590:

"We are inclined to the view that the construction placed upon statutes of this nature by the Massachusetts court is preferable to that of the Michigan court. We feel that the lack of any specific reference, either in the title or in the body of the Iowa Housing Law, to the relation of landlord and tenant, and the absence of anything in either the title or the body of the law to indicate an intention to change the common-law rule and impose civil liability upon the landlord for damages sustained by a tenant growing out of a failure to repair in the demised premises, indicate that there was no intention on the part of the legislature to change such rule and impose such liability."

Recovery against the landlord has also been allowed to tenants by the courts of Georgia and Louisiana. Due to the fact, however, that the statutes in both of these states contain specific provision for the civil liability of the landlord to respond in damages, the decisions are not actually in conflict with the Massachusetts rule. See *Boutte v. New Orleans Terminal Co.,* (1916) 139 La. 945, 72 So. 513; *Finley v. Williams,* (1932) 45 Ga. App. 863, 166 S.E. 265; *Mathis v. Gazan,* (1935) 51 Ga. App. 805, 181 S.E. 503.

In Oklahoma and in California the statutes provide that in the event the landlord fails to make repairs, after having been notified of the necessity therefor, the tenant has the election of making the repairs himself and deducting the cost thereof from the rent payments, or to vacate the premises. It is held in both of these states that the tenant is limited to the remedies provided by statute and the landlord is under no liability to the tenant for injuries received on account of the landlord's failure to repair. See *Willson v. Treadwell,* (1889) 81 Calif. 58, 22 Pac. 304; *Young v. Beattie,* (1935) 172 Okla. 250, 45 Pac. 2d 470.

There are many states where the question has never been raised and due to the irreconcilable conflict in the decisions it is, of course, impossible to predict which view of the situation a court may take. In the recent Ohio case, *Tair v. Rock Investment Co., supra,* the

Supreme Court of that state accepted the Massachusetts rule as being the better view. The circumstances under which the case arises may have a great deal of influence upon the policy that is ultimately adopted by the Court. If the question arises in connection with the maintenance of a tenement house in a large city that is infested with poor tenement dwellers, the Court may choose to adopt the benevolent attitude of Judge Cardozo and allow the injured tenant to recover. On the other hand, if the litigation chances to involve a dwelling house or apartment building in a good middle-class neighborhood, then the Court probably will be more reluctant to upset the long existing rules of common law in order to protect the tenant. In any event, the problem is one of a serious nature for the casualty underwriter for when a court chooses to follow the New York rule the risks covered by a landlord's liability policy are very, very greatly increased.

Surety's Liability For Injuries Resulting From Negligent Operation of a Motor Vehicle by Public Officer

By J. Harry Schisler
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WHEN Henry Ford and his fellow pioneers put America on wheels they unwittingly set into motion a chain of events which has resulted in the introduction into our jurisprudence of a whole body of new law. This is the law of negligence as applied to the operation of motor vehicles. Dealing with the many and intricate problems in that branch of the law has been largely the burden of casualty companies and casualty insurance lawyers. Surety companies and surety lawyers have been only mildly aware of such controversial subjects as contributory negligence—right of way—guest liability, etc. etc. It is no part of the purpose of this paper to encroach upon that field.

To a limited extent, however, negligence in the operation of a motor vehicle is of interest to the surety lawyer. To some it may come as a surprise to learn that there are circumstances under which a surety bond has been held to cover damages for injuries resulting from the negligent operation of a motor vehicle. It is the purpose of this paper to discuss a few cases in which the courts have considered a surety's liability when faced with such a claim.

The question has arisen in connection with bonds of public officers. Generally a public officer is required by statute to file a bond conditioned that he will faithfully perform the duties of his office. A sheriff, deputy, policeman or other officer, having filed such a bond, drives his automobile or motorcycle on a public highway in such a negligent manner as to collide with and injure some one. Does he thereby breach his bond, with resultant liability on his surety?

Among the early decisions dealing with this subject are two cases in Kentucky decided in 1921. Each case involves a claim for damages for personal injuries against the surety on the bond of a police officer, based upon alleged negligence on the part of the officer in the operation of a motor vehicle. At the time these two cases arose, Kentucky had a statute requiring police officers to furnish a bond conditioned that the officer "shall well and truly perform the duties of said position, and make no trespasses against any person under the guise of said position for which he or the city may be held liable." In each case the proof showed that the plaintiff sustained personal injuries as the result of the negligent operation of a motor vehicle by the officer involved. The court was asked to decide whether on such proof the plaintiff was entitled to recover from the officer's surety.

In the first case, *Manwaring v. Geisler*, 230 S.W. 919 (Ky.), the court based its findings on this language in the bond—"shall—commit no trespasses against any person, etc." The court pointed out that the bond was broader than a faithful performance of duty bond, and indicated that if the bond were limited to faithful performance of duty there would be no liability. In that event, the court said the bond would be liable only for

misfeasance, malfeasance, or nonfeasance of duty on the part of the officer, and it would not be liable for negligence on his part.

In the second case, *Sauer v. Fidelity & Deposit Company of Maryland,* 234 S.W. (2) 434 (Ky.), the bond contained the same language as the bond in the Manwaring case. Again the surety was held liable. In the course of its opinion the court said that it found no necessity to say what the liability of the surety would be without the "trespass" clause. In effect, however, the court said that the surety would be liable even without the "trespass" clause.

In 1924 a third case came before the Court of Appeals of Kentucky—*Fidelity and Casualty Company v. Boehnlein,* 260 S.W. 353 (Ky.), and this time the bond did not contain the "trespass" clause; it was conditioned merely upon the officer's faithfully performing his duties. The court treated as dicta what it had said in the earlier cases about the presence or absence of the "trespass" clause, and proceeded to decide the question on the basis of the language in the bond covering solely faithful performance of duties. The court said that an official bond covers misfeasance, malfeasance, or nonfeasance on the part of the officer. It was argued on behalf of the surety that negligence in the operation of a motor vehicle was none of these. However, the court took the view that any negligence on the part of an officer in the performance of duties done by virtue of his office, would make the surety liable. It said that the officer in operating the motor vehicle was performing the duties of his office and that his performance of those duties in such a way that his negligence caused injury to a third person was sufficient to make the surety liable.

In 1927 in the case of *U. S. Fidelity and Guaranty Company v. Samuels,* 157 N.E. 325 (Ohio), the Ohio court was faced with the same question. It decided the case on reasoning substantially similar to the reasoning of the Kentucky court in the Boehnlein case. Then followed a number of decisions with similar results. See *Curnyn v. Kinney,* 229 N.W. 894, (Nebr.); *Booth v. Rickerson,* 165 S.E. 893, (Ga.); *Hanratty v. Godfrey,* 184 N.E. 842, (O.); *Rutledge v. Small,* 6 S.E. (2) 260, (S. C.); *Small v. National Surety Corporation,* 19 S.E. (2) 658, (S. C.). In each of these cases the bond was conditioned solely upon faithful performance of duty. There was no "trespass" clause in any of them.

In some other cases the courts, while not questioning the rule laid down in the above cases, absolved the surety of liability on the ground that the officer was not engaged in the performance of his duty at the time of the accident. A typical case of this kind is *Filarski v. Corey,* 242 Pac. 874, (Cal.). There is much doubt and confusion as to what does or does not constitute performance of official duties. Here some of the courts make the distinction between acts done virtute officii and acts done colore officii. In some states the courts make no distinction between the two classes of acts. Illustrative of the hair-splitting that is done at times in an effort to determine whether a particular act was in the line of duty or otherwise are the following: *Clement v. Dunn,* 299 Pac. 545 (Cal.); *Usrey v. Yarnell,* 27 S.W. (2) 988, (Ark.); *McVey v. Gross,* 11 Fed. (2) 379, (Tex.).

These cases seem to lead to this result: If an officer is operating a motor vehicle in the regular course of duty, proof that he did so negligently, thereby causing injury to a third person, is sufficient to make the surety on his bond liable in damages to that person.

This was the situation until 1939 when a case in Louisiana produced a different result. Then, following the decision of the Louisiana court, at least two other courts declined to follow the rule laid down in the Boehnlein case. In each of the three cases the court's attention was called to the earlier decisions, so that it cannot be said that the court reached its conclusion without giving consideration to them. Instead the court rejected the reasoning of those cases and reached a conclusion entirely at variance with the findings in those cases. The three cases are, *Gray v. DeBretton,* 188 So. 722 (La.); *Nelson v. Bartell,* 103 Pac. (2) 30, (Wash.); *Aetna Casualty & Surety Co. v. Clark,* 150 S.W. (2) 79, (Tex.).

In these cases the courts say that the officer, while operating a motor vehicle, owes no duty to the public in his official capacity that he does not owe as a private citizen while operating a motor vehicle. Even though the officer is operating a motor vehicle in the course of the performance of his duty, his negligence as to the general public does not constitute a breach of duty; it is neither

misfeasance, malfeasance, or nonfeasance in office.

In the case of *Gray v. DeBretton* the court said: "The purpose of an official bond is to provide indemnity against malfeasance, nonfeasance and misfeasance in public office. Such a bond cannot be construed so as to operate as a policy of insurance in favor of the travelling public against damage in an automobile collision;" and in *Nelson v. Bartell* the court said: "Is it not reasonable to conclude that the official bonding system was created with the sole purpose and intention of protecting the public against their (officers) abuse of the extraordinary powers conferred upon them as officers; and that the system is in no way intended to furnish protection against the abuse of those general and original powers which they as non-officials formerly possessed and were accustomed to exercise."

It will be observed that the decisions in the three cases last referred to deal with injuries inflicted upon a member of the general public with whom the officer had no official business or connection at the time of the accident. It was pointed out by the court that the bond would be liable if injury is inflicted upon one with reference to whom an official act is being performed, as for instance, one in the custody of the officer at the time. In *Nelson v. Bartell* the court makes this very clear. It says: "If a deputy were conveying a prisoner to jail and drove at a wildly reckless speed and overturned, injured the prisoner, and at the same time a pedestrian on the sidewalk, the prisoner might resort to the bond but not the pedestrian."

It will also be observed that in this same case the court, impliedly at least, draws a distinction between its decision and the decision in the Boehnlein case based on the fact that the officer involved in the latter case was required as a part of his duties to operate a motorcycle (he was a motorcycle policeman), whereas in the Nelson case the use of the automobile by the officer was incidental and conceivably he might have performed his duties without the use of the automobile. However, the decision is not based entirely on that distinction and it would seem that such a distinction would be too narrow a foundation for a rule of law under present day conditions where the use of automobiles by peace-officers is almost universal.

There are, then, two lines of decisions on the question of law involved, the earlier cases holding the surety liable; the later cases holding the surety not liable. The fact that, since the decision of the Louisiana Court in *Gray v. DeBretton,* the courts of Washington and Texas have followed the reasoning of the DeBretton case may indicate a trend away from the rule laid down in the earlier cases. However, in the case of *Alford v. McConnell,* 27 Fed. Supp. 177, (Okla.), affirmed in 111 Fed. (2) 388, decided in 1939, the argument was made that the injured persons were not transacting official business with the officer; that the relationship between them and the officer was the same as that existing between any other travelers on the public highway; that the officer's duty to drive carefully existed independently of his office and not because of it, and that there was no basis for holding the surety liable for the injuries. The federal court refused to accept this argument.

It will be interesting to note whether states in which the question of liability has not been passed upon will follow the one line of cases or the other. Even though lawyers may be deprived of the use of automobiles under the stress of present conditions, it is likely that peace-officers will continue to have the use of them without interruption; consequently, the question is not likely to become academic even during the war period.

The Origin of Fidelity Coverage

By Raymond N. Caverly
Vice President, The Fidelity & Casualty Company of New York
New York City

ORIGINS are always interesting, whether or not they are important. Coverage against dishonesty, or, as it is popularly known, fidelity coverage, is one of the oldest, if not the oldest, of the coverages now customarily written by casualty and surety companies. Fidelity coverage is commonly thought of and spoken of as suretyship. In the be-

ginning, however, it was referred to as insurance, and the contracts of coverage, known as 'guarantee policies,' were in the form of insurance contracts, with only the insurer and the employer as signators. A separate agreement between the insurer and the employed person provided for indemnification of the insurer in the event of loss. As the business developed it became evident the insurer would have better protection by a three-party contract, and for many years preceding the development of the modern blanket types of coverage, as is well known, fidelity coverage was written in the form of suretyship. The blanket types of coverage in vogue at the present time are referred to as 'bonds,' notwithstanding the fact that many hazards in addition to dishonesty are covered and the language employed is the language of insurance. The distinction between contracts of insurance and contracts of suretyship has been discussed with some frequency in court decisions and by text writers. (See Footnote No. 1).

Like most other types of coverage with which we are familiar in the United States, fidelity coverage originated in England. The first printed reference to it which the writer has been able to find is in the following advertisement which appeared in the London Daily Post, June 10, 1720:

"Whereas notwithstanding the many excellent Laws now in force for punishing hired servants for Robbing their masters, or mistresses, yet noblemen as well as commoners are daily sufferers; and seldom a Sessions but great numbers are convicted, to the utter ruin of many families and also a scandal to the Christian religion. This is to give notice that at the request of several house-keepers, Books will be open'd next Saturday at the Devil Tavern, Charing Cross, at 10 a clock, wherein any person may Subscribe, paying 6d. p.c. for a share calle'd £1000 stock; no more shares than 3000, and the call for a stock not to exceed 10s. p.c. the first year by quarterly payments. This Society will insure to all masters and mistresses whatever loss they shall sustain by Theft from any servant that is Tick'd and Register'd in this Society. As also to support such servants out of place that shall fall sick or lame, according to the articles to be laid before the managers when chosen.

"N.B. Besides the Laws made in favour thereof, a petition is to be presented to His Majesty, for his Royal Letters Patent; which no doubt will be granted, and encouraged by all Noblemen, Gentlemen, and others; and be not only a Society to all masters and mistresses, but oblige servants to behave themselves respectfully to the masters; and also a support to such servants when sick or lame, for an inconsiderable charge."

It does not appear that the project referred to in this advertisement ever matured, probably due to the great business upheaval, resulting from the "breaking of the South Sea bubble," which swept over England about that time. It is interesting to note that it was proposed to provide workmen's compensation benefits as well as fidelity coverage. Perhaps this was likewise the beginning of workmen's compensation insurance.

There is no evidence of any organized effort to provide dishonesty coverage following this period until the year 1840, when the Guarantee Society of London was formed. The prospectus respecting the formation of this Society read as follows:

"The Guarantee Society has been established to obviate the defects of the system of suretyship by private bondsmen, which is universally acknowledged to be attended with various inconveniences and objections; instances have constantly occurred in which persons of the highest respectability have been obliged to forego valuable appointments; from either the great difficulty of obtaining security, or a repugnance to place their relatives or friends and themselves under the obligation involved therein. The Guarantee Society undertakes, on the payment of a small premium per cent. per ann., to make good in case of default by fraud or dishonesty, any losses which may be sustained to an amount specifically named and agreed upon in their policy, and by such means obviate the necessity for private sureties as well as the obligations arising therefrom, which often prove as prejudical to the best interest of employers as to the party seeking guarantee.

Footnote No. 1—See "Is Suretyship Insurance?" by Clarence F. Merrell, Insurance Counsel Journal, October, 1938; see, likewise, discussion of the distinction between suretyship and insurance in American Law Institute Restatement of the Law "Security," Chapter 3, Paragraph 82.

"Rate of premium 10s. per cent. per ann. and upwards (according to the nature of the employment) on the amount of security required."

In the year 1842 Parliament passed a statute entitled "An Act For Regulating Legal Proceedings By Or Against 'The Guarantee Society' And For Granting Certain Powers Thereto." The important thing about the passage of this act is that it empowered the Lords of the Treasury and the heads of Public Departments to accept policies of the Guarantee Society in connection with public employees in lieu of private bond or other security. This seems to be the first official recognition of corporate suretyship for public officials.

The Guarantee Society was successful in its operations as indicated by the following reference to it in the 'Annals of Life Insurance' published in 1853 by a Mr. Francis:

"When this Co. was first started in 1840 for insurance against loss by dishonesty of clerks, there was a great objection raised. It was thought one of those vague and speculative undertakings of which England has seen so many, and one which would necessarily fail, because the master would hesitate to take an assistant who could only give the security of a commercial co. 'The moral security is wanting!' was the exclamation of all. It was vain to answer that this objection pointed both ways, as the relative would often give the desired bond which a mercantile institution would refuse. Still the parrot reply was heard, and the solemn shake of the head was followed by 'The moral security—where is the moral security?' and was deemed sufficient to crush all argument derived from mere statistics. Time passed, and it was discovered that because a banker's clerk gave the security of a company he did not become a rogue, but he did become independent. It was found too that the master could make his claim good on the company with far more promptitude than he could on a relative. It was nothing to say to a board of directors, 'I will have justice and my bond,' but it was something to say to a broken-hearted parent 'Your son has ruined you as well as himself—discharge your obligation!' It is well known that bankers and merchants have often foregone their due rather than thus reimburse their losses; and it has been found that notwithstanding the facts of the moral security being wanting, the societies which guarantee the master from loss by the servant have been very successful and very serviceable, and on the increase."

Other societies of a similar nature soon developed. These organizations were called 'societies,' but it appears that in reality they were stock companies. An interesting development took place in connection with the formation of some of these societies in that insurance of dishonesty was combined with insurance on life. It appears that one premium was charged for both coverages and the contract provided that in the event of a loss due to dishonesty the life insurance coverage terminated. The theory of joining the two seemed to be that preservation of the life insurance would be an incentive to the employed person to refrain from dishonesty.

In 1869 the London Guarantee and Accident Company was founded and engaged in the writing of fidelity and accident coverage in Great Britain. It entered the United States in 1892 and became active in writing the same lines here. This company seems to have been the first company of modern type to write fidelity coverage. As is well known, it is still in existence and active in this country as well as in England, but by an anomaly is not now actively writing fidelity coverage.

Blanket bonds are commonly thought of as a modern development in dishonesty coverage. It appears, however, that the London Guarantee and Accident Company originated blanket coverage very early in the development of the business. In the year 1874 that company commenced writing 'floating policies' covering any number of clerks over five on a blanket basis. In a prospectus covering this type of coverage it was stated:

"The experience of the London Guarantee and Accident Co., with large staffs, such as the Post Office and other Government Departments, railways, and large commercial firms, confirmed by that of the several mutual funds now in existence, has induced the directors to modify the old practice hitherto followed. The troublesome system of individual contracts, long lists of questions, and personal inquiries will be abandoned in such cases, and a new form

of contract adopted under the title of a 'floating policy.'

"This policy will cover any number of defaults that may arise during any year of its currency up to the full amount insured, or, if it be preferred, the policy will be indorsed, assigning the limit of the loss to each particular clerk at say £100 or £200 or more, according to the position and responsibilities.

"To effect a floating policy all that is necessary is for the employer (in the case of a public company, the manager or other appointed officer) to state the names and addresses of the clerks, their duties, and the general system of the office, in reference to money, receipts, and payments. In the event of changes in a staff, the name of the new member may be added, and the total number covered by the policy may be increased on payment of the proportionate premium."

"These policies apply only to staffs of clerks or others engaged in an office under the control of a principal or a superior. Application should be made to the head office of the company."

The prospectus quotes the rate at £50 for £1000 coverage for a staff not exceeding twenty in number and other rates on substantially the same basis for smaller groups and for varying amounts of coverage.

The earliest project in connection with dishonesty coverage in the United States was the formation of a New York corporation known as The Fidelity Insurance Company, which commenced business on April 7, 1866. This venture, however, was short-lived and the corporation was voluntarily dissolved on February 25, 1867. The New York Insurance Department report for the year 1867 contains the information that this company in the course of its short existence received $1,618 in fidelity premiums and paid no losses. One explanation of the failure of this effort to pioneer in a new field is given by The Insurance Monitor, an insurance periodical of that period, in its issue of April, 1867, in the following news item:

"THE FIDELITY INSURANCE COMPANY: This Company, having remained faithful to the last to 'Old Fogyism,' ignoring the press and refusing to advertise, has, although it would infallibly have succeeded under a proper and vigorous maganament, failed from sheer inanity. It has discontinued business and is retiring its capital. Its birth and baptism took place about a year ago, and now, alas, the yearling must give up the ghost."

Whatever the reason was, it is quite evident the Fidelity Insurance Company did not advertise in The Insurance Monitor.

The first successful and continuing venture in writing fidelity coverage in this country was undertaken by The Fidelity & Casualty Company of New York, first known as The Knickerbocker Casualty Insurance Company. This company was incorporated in 1876 and for the first three years of its existence wrote plate glass, accident and steam boiler coverages. There was a change in management in 1879, and The Insurance Monitor, in the issue of April, 1879, carried the following news item:

"The new management proposes to work 'Fidelity Insurance.' Under it the Company will undertake to insure public officials, cashiers, and men employed in a fiduciary capacity."

Some fidelity coverage was developed in that year and in the report of the New York Insurance Department for the year 1880 the Knickerbocker Casualty Insurance Company, by then known as The Fidelity & Casualty Company, is credited with writing $725 in fidelity premiums in the previous year. It appears from the Insurance Department report that twelve risks were written, involving a total exposure of $45,000, and that no losses were paid or incurred.

There is in existence the original of one of the twelve policies referred to in the Insurance Department report. This contract is dated August 22, 1879. It runs to the Western Union Telegraph Company and covers an employee named George W. Henry. The amount of coverage is $1,000 and the premium $15.00. There is a receipt on the back of the policy showing that Mr. Henry rather than the employer paid the premium.

This contract, one of the first twelve ever written in this country, is interesting not only because of its terms but because it is called a policy—not a bond. The word 'policy' is printed under the address of the company on the face of the contract. The contract was

made between the Knickerbocker Casualty Insurance Company and the Western Union Telegraph Company, and while by its terms it is a three-party contract and there is a provision for signature by the employed person, it was not signed by such person. The insuring clause provides that:

> "The company will make good and reimburse to the employer to the extent of the sum of $1,000 and no further, all and any pecuniary loss sustained by the employer by reason of any fraud or dishonesty of the employed, in connection with the duties heretofore referred to, as shall amount to embezzlement of money, to be committed during the continuance of the policy and discovered during such continuance, or within three months thereafter, or within three months from the death or dismissal or retirement of the employed."

The provisions with respect to notice and with respect to the obligation of the insurer and the employer are substantially the same as used today. The provisions with respect to the rights of the insurer against the employed person are, however, most far-reaching. We quote:

> ". . . that in case the Company shall receive notice in writing of any claim made or intended to be made under or by virtue of such Guarantee as aforesaid, it shall be lawful for the Company forthwith, or at any time thereafter, and without any previous notice to the Employed, in a summary manner, by themselves or any of their Clerks or Officers, or by any other person or persons in their behalf, and the Company and their officers are hereby authorized and requested by the Employed to take possession of any money, goods, chattels, property, or effects which the Company may find belonging to the Employed, and to enter into any house or houses, apartments, rooms, or other premises of the Employed, wherein or upon which any money, goods, chattels, property, or effects whatsoever belonging to him may then happen or may be supposed to be; and by breaking open any outer or inner doors or windows of any such house or houses, apartments, rooms, or other premises, to take full and absolute possession of such money, goods, chattels, property and effects, and either to remain in, and continue such possession on the premises, or to remove the same or any part thereof, for safe custody, to such place or places as the Company shall think fit. And in case the Company shall have any claim made upon them, or shall make any payment in respect of any claim under the said Guarantee for loss or damage as aforesaid, it shall be lawful for the Company to sell the said goods, chattels, property, and effects, or any part thereof, at its discretion, and in such manner as it shall deem most eligible and proper for its own indemnification and reimbursement, not only in respect of such payment, but also of all costs, charges, and expenses paid and incurred in investigating and ascertaining the truth and validity of the claim, or resisting the same as aforesaid, and all costs, charges and expenses of seizing, keeping, and selling the said goods, chattels, property, and effects, or incident thereto, the remainder (if any) of the said goods, chattels, property or effects, or the excess or balance of proceeds of any such sale or sales after all such indemnification, reimbursement, and payment as aforesaid, to be held for and delivered or paid to the Employed, his executors or administrators, for his or their own use; and the Employed indemnifies the Company against all consequences of acting under this Agreement, and agrees to execute any more formal Deed or Instrument as may be deemed necessary for effectuating such Indemnity whenever called upon to do so. And further, that in case the Company shall make good any loss or damage under such Guarantee, the Company is hereby fully empowered to enter the name of the Employed as a defaulter in the public book or books, list or lists, kept by the Company for that purpose, and which may (at the discretion of the Company) be and remain open to the inspection of all persons without any responsibility to the Company or its Servants, Clerks, or Agents in respect thereof."

Fidelity coverage today has developed into a most important factor in the conduct of all types of commercial enterprises as well as being one of the major sources of income for most casualty and surety companies. The total fidelity premium for all companies licensed to do business in the United States for the year 1942, according to the Spectator Insurance Year Book, was $42,259,682.

Resume of Informal Meeting of Executive Committee in Detroit, Michigan

By Oscar J. Brown

ALTHOUGH Willis Smith, president of our Association, found it necessary to call off the annual meeting of the association which had been scheduled to be held at White Sulphur Springs commencing August 26th, the activities of the association and its welfare have been actively looked after by the president and the members of the executive committee in the interim.

How wise the action of the president was in calling off the meeting was emphasized by the announcement that the Greenbrier at White Sulphur Springs has been taken over by the government as of September 1st for a military hospital.

In Detroit on the occasion of the attendance of a number of our members at the American Bar Association meeting, the president called a meeting of those members of the executive committee as were present at the American Bar Association meeting and such other members of the association as conveniently could be located to meet with him on Monday morning, August 24th, to discuss the present activities of the association, having in mind the impact of the war effort.

The executive committee members present in addition to the president were F. B. Baylor, Thomas N. Bartlett, Oscar J. Brown, Franklin J. Marryott, Paul J. McGough, Robert M. Noll and J. Mearl Sweitzer.

Other members of the association present were L. J. Carey, Milo H. Crawford, Price H. Topping, Mark Townsend, Miller Manier, Lionel Kristeller and Forrest Betts.

A lengthy, enthusiastic, but informal, discussion was held with respect to the difficulties which had compelled the president to call off the annual meeting, and letters bearing upon the subject were read from executive committee members who were not present including Patrick F. Burke, Pat H. Eager, Jr., Allan E. Brosmith, Richard B. Montgomery, Jr., Joe G. Sweet, George Yancey and Hal C. Thurman.

After a thorough discussion of all the matters affecting the problems of having an annual meeting, there was universal approval of the action of the president in not attempting to have the meeting as scheduled.

Discussion continued as to the possibility of holding an annual meeting of the entire association at sometime in the not too distant future, and all present agreed that the difficulties of holding a general meeting of members were such that it ought not to be attempted.

Discussion then continued as to what steps ought to be taken by the executive committee to carry on in the absence of a general meeting and it was unanimously decided to continue the Journal and to attempt to improve it as much as possible, and also attempt to issue an interim news letter between the issues of the Journal containing news of more or less personal matters of the membership.

It was also thought best to have a purely business meeting of the executive committee of the association at the call of the president; it being suggested with approval that such a meeting be held either in February or March of 1943 and in Chicago, if possible, and that coincident with that business meeting there be a voluntary "get together" for at least an evening session for those members of the association not too far away from Chicago as could find time to attend.

Although not definitely decided upon, the sentiment of both the officers and members at the meeting seemed to be that if the "get together" of members around Chicago was enthusiastically received and deemed a success, that until such time as a general membership meeting of the association could be called, that the business of the association would be transacted by similar executive committee meetings with accompanying membership "get togethers" at suitable intervals in different centers of the country.

It was the unanimous expression of those present that both President Smith and Editor Yancey of the Journal should be given as far as possible the energetic help of each member of the association in continuing and

bettering the Journal and carrying on for the duration.

As a legalistic matter the constitutional lawyers present at the meeting agreed in their opinion that the present officers of the association under the terms of our constitution, automatically continue until their successors were properly elected and had qualified.

SUMMARY OF THE REPORT OF THE TREASURER

August 1, 1941 to July 31, 1942

RECEIPTS

July 31, 1941	Balance, Cash on Hand	$22,775.52
Jan. 1, 1942	Interest on Savings Accounts, The Peoples Banking & Trust Co., Marietta, Ohio; The Dime Savings Society, Marietta, Ohio, The Citizens Bank Company, Beverly, Ohio	158.07
Feb. 11, 1942	Richard B. Montgomery, Secretary	7,000.00
May 11, 1942	Richard B. Montgomery, Secretary	4,000.00
July 1, 1942	Dividend, Dime Savings Society	37.50
July 1, 1942	Interest, Citizens Bank Company	37.50
July 1, 1942	Interest, Peoples Banking & Trust Co.	7.50
July 22, 1942	Richard B. Montgomery, Secretary	1,000.00
	Total Receipts	$35,016.09

EXPENDITURES

Convention, 1941, White Sulphur Springs	$ 2,861.39
Secretary, Expense	1,037.79
Assistant to Secretary, Salary	1,769.30
Treasurer	85.28
Printing	128.78
Legislative Committee	32.09
Journal	3,282.69
President	64.70
Incidentals	100.38
Winter Meeting	3,190.10
Total Expenditures	$12,552.50

RECAPITULATION

Total Receipts, Interest	$35,016.09
Total Expenditures	12,552.50
Balance on hand, July 31, 1942	$22,463.59

Respectfully submitted,
R. M. NOLL, *Treasurer.*

Report of Standing Committee on Aeronautical Law

IT has not been possible for the members of the Committee to have meetings during the year, but the Committee desires to submit to the Association a short report.

The attention of the legal profession has been focused largely on two principal phases of the development of aeronautical law:

(1) The law with respect to economic regulation and particularly in connection with the activities of the Civil Aeronautics Board;

(2) The law with respect to legal liability for damages arising out of the operation of aircraft.

This report need not cover legal developments in the field of economic regulation, although indirectly economic regulation has a close relationship to insurance practice. The Committee is of the opinion that economic regulation, and safety regulation for the most part, ought to be under national laws and not under a variety of local and state laws. Air transportation being designed to cover great distances at high speeds, it is unthinkable that it should be subjected to state or local economic or safety regulation except in so far as to give effect to the Federal program. The National Association of State Aviation Officials in 1934 recommended that the states adopt the so-called "Uniform Regulatory Act," but since then the Civil Aeronautics Act of 1938 has been passed by Congress and a national program of uniform regulation under the aegis of the Act of 1938 has been put into effect. Your Committee feels that at least for the time being, state and local bodies should, at most, merely aid, by way of implementation, the national program as to economic and safety regulation.

There is now a lively interest in the subject of legal liability in aviation accidents, and a so-called "Uniform State Aviation Liability Act" was recommended by the Commissioners on Uniform State Laws in 1938. Among the points giving rise to considerable dispute are those in relation to proof of negligence, the possibility of liability without fault, and the possibility of limiting the amount of recovery for death. There are those who believe that there ought to be a prima facie presumption of negligence in connection with airplane accidents comparable to the presumptions that have been created by statute in many states in relation to railroad accidents. There are some who believe that *res ipsa loquitur* ought to apply because in many cases there are no survivors to explain the circumstances of the accident. In connection with these matters, there has been some consideration of compulsory insurance for the protection of passengers or outsiders in respect to aviation liability.

The aeronautical industry being a young and growing one, and new circumstances coming in for consideration almost daily, it has been felt by many professional groups that it would be unwise to undertake to enact a sweeping and comprehensive program of liability legislation without greatest deliberation. Accordingly, the Civil Aeronautics Board was requested some two years ago to make a special study of proposed aviation liability legislation. On June 1, 1942, the Board published a comprehensive report setting forth the results of its studies. Honorable Oswald Ryan, a member of the Board, on July 15, 1941 mailed out copies of this report together with a letter reading in part as follows:

> "The need for remedial liability legislation to be applicable after the occurrence of aircraft accidents has been under consideration for a number of years by committees of several organizations which have from time to time suggested legislative proposals. The attached report analyzes these proposals. It was prepared for the purpose of assisting the Board, and other interested persons, in determining the desirability of federal and state remedial aviation liability legislation. The report is comprehensive in that it covers all types of liability resulting from the operation of civil aircraft commercially and for pleasure. The report is supplemented by 31 factual and statistical exhibits and the text is divided into ten parts which are listed in the table of contents.
>
> "It is realized that the determination of pecuniary liability to victims of aircraft accidents, like victims of other modern forms of transportation, presents financial and social problems upon which many different opinions have been expressed. As a result, the attached report is released in advance of the Board's formulating its own recommendations so that interested parties

may have an opportunity to comment upon the report, its recommendations and the action that should be taken in this field.

* * * *

"As a matter of convenience in analyzing comments it is suggested that in so far as they deal with the following issues that comments adhere to the following general classification: (1) the need for and desirability of remedial aviation liability legislation in general; (2) the scope of the statute, i.e., the type of accident that should be brought within the purview of such legislation, if legislation is to be recommended; (3) the standards to measure liability and the maximum limits thereof that should be made applicable to operators with respect to passengers, to goods carried, to persons and property on the ground, and to collision of aircraft; (4) the necessity of supplementing such legislation with compulsory liability insurance to insure payment and to spread losses; (5) the advisability of promulgating such legislation by a uniform state act, a federal act, or either type supplemented by the other; and (6) other comments.

"A limited number of copies of a 97 page summary of the text of this report are available. This summary does not include the exhibits found in the appendix, and omits detailed statistical analysis and citation of cases which form a valuable portion of the report."

The Committee recommends that any members of the Association particularly interested in the subject communicate with the Civil Aeronautics Board in Washington, D. C., and obtain a copy of this report.

Aviation has a considerable impact not only upon casualty insurance, but also upon life insurance, fire insurance and substantially all other forms of insurance. Year by year the courts and the legislatures endeavor to fit law to the developments in the industry in furtherance of the general welfare. Insurers generally have come to recognize and accept air transportation and the use of airplanes as a commonplace in current life and gradually they are eliminating special policy provisions that heretofore have treated aeronautical activity as unusually hazardous or as coming outside the course of ordinary events. This growing tolerance on the part of insurers has had a stimulating effect upon the development of aviation, and the development of aviation has opened up new fields for insurance.

Insurance coverage on passenger air transport operations has grown to substantial proportions in recent years. More recently insurance companies have discovered new fields for underwriting in connection with the greatly expanded program of cargo transportation by commercial air carriers for the Army and the Navy. It behooves the insurance companies as business organizations, and lawyers engaged in insurance practice, to give serious and unremitting thought and attention to the dramatic developments that are taking place within the aeronautical industry—and particularly in connection with the national defense program.

Respectfully submitted,
E. SMYTHE GAMBRELL, *Chaiman*
GEORGE B. LOGAN
RUPERT G. MORSE
W. PERCY MCDONALD
W. R. MCKELVEY.

Report of Casualty Insurance Committee for 1942

THE Casualty Insurance Committee considered a number of projects for its activity this year. All members of the Committee were given an opportunity to submit suggestions, and after all of the members had considered the recommendations that had been made the majority expressed the opinion that a compilation of cases passing upon the Stay of Proceedings provisions of the Soldiers' and Sailors' Civil Relief Act would be of value to the members of the Association. This undertaking was therefore adopted as the project of the Committee for this year.

The Soldiers' and Sailors' Civil Relief Act of 1940 was passed for the purpose of giving men in the service a relief that they would not enjoy otherwise by protecting their civilian interests while they are engaged in the defense of their country. The relief provided by the Act prevents interference with military duties, and facilitates the speedy development of a military force. To this end as

during the last war it has been held that the Act should be construed liberally in favor of those engaged in the service.

Clark vs. Mechanics American National Bank, (1922) C.C.A. 8, 282 F. 589, Hunt vs. Jackson (1942) 33 N.Y.S. (2nd) 661.

Section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix Sec. 521, Act of October 17, 1940, 54 Stat. 1181, provides that:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Fortunately, the Act of 1940 is identical in most respects with the Act of 1918. Undoubtedly, the construction of the 1918 Act and the scope of the discretion then exercised will be persuasive in construing the 1940 Act, and in suggesting to the trial court the course to be taken in the use of its discretionary powers. There is no question but what the responsibility for protecting the interests of those in the military service is placed upon the trial court.

"It was the evident purpose of Congress to make it discretionary with the trial judge whether, under the facts of a particular case, a stay of proceedings should be had. Unless, therefore, the lower court abused its discretion no relief can be accorded defendant."

Fennell vs. Frisch's Adm. (1921) 192 Ky. 535, 234 S. W. 198.

In this report your Committee has endeavored to bring together all authorities both under the Act of 1918 and that of 1940. The citation of authority herein covers all cases which in some manner have involved the power of the court to stay proceedings so that if an exhaustive search of the law is necessary or advisable in any given case the authorities will be readily available. Your Committee has undertaken to separate for comment only those cases having a direct application to the work of the casualty insurance lawyer.

FEDERAL

Clark vs. Mechanics' American National Bank (1922) C.C.A. 8; 282 F. 589.

Ebert vs. Poston (1925) 266 U. S. 548; 69 L. Ed. 435; 45 S. Ct. 188.

*Lanham vs. Cline (1942) 44 F. Supp. 897.

*Swideraki vs. Moodenbaugh (1942) 44 F. Supp. 687.

The Sylph (1941) 42 F. Supp. 354.

Royster vs. Lederle, 128 Fed. (2) 197.

Bowsman vs. Peterson, 45 Fed. Supp. 741.

ARIZONA

Perkins vs. Manning, 122 P. (2) 857.

Twitchell vs. Home Owners' Loan Corporation, 122 P (2) 210.

ARKANSAS

Davies and Davies vs. Patterson (1919) 137 Ark. 184; 208 S. W. 592.

CALIFORNIA

Tulley vs. Superior Court (Cal. App.) 113 P. (2) 477.

IOWA

Studt vs. Trueblood (1921) 190 Iowa 1225; 181 N. W. 445.

KENTUCKY

*Fennell vs. Frisch (1921) 192 Ky. 535; 234 S. W. 198.

LOUISIANA

Charles Tolmas, Inc. vs. Streiffer, 5 So. (2) 372.

MINNESOTA

Nelson Real Estate Agency vs. Seeman (1920) 147 Minn. 354; 180 N. W. 227.

Taylor vs. McGregor State Bank (1919) 144 Minn. 249; 174 N. W. 893.

MISSOURI

State ex rel. Clark vs. Klene (1919) 201 Mo. App. 408; 212 S. W. 55.

NEW HAMPSHIRE

*Halle vs. Cavanaugh (1920) 79 N. H. 418; 111 A. 76.

*Steinfield vs. Mass. Bonding and Insurance Co. (1921) 80 N. H. 39; 112 A. 800.

NEW JERSEY

Union Labor L. Ins. Co. vs. W., 19 N. J. Misc. 496; 21 A. (2) 317.

NEW YORK

Associates Discount Corp. vs. Armstrong, 33 N.Y.S. (2) 36.

Brooklyn Trust Co. vs. Poppa, 33 N.Y.S. (2) 57.

Clarke vs. Clarke, 25 N.Y.S. (2) 64.

Cortland Sav. Bank vs. Ivory, 27 N.Y.S. (2) 313.

Dietz vs. Treupel (1918) 184 App. Div. 448; 170 N.Y.S. 108.

*Griffin vs. Bergh, 33 N.Y.S. (2) 789.

*Griswold vs. Cady, 27 N.Y.S. (2) 302.

Hunt vs. Jacobson (1942) 33 N.Y.S. (2) 661.

Re Itzkowitz, 30 N.Y.S. (2) 336.

Jamaica Sav. Bank vs. Bryan, 25 N.Y.S. (2) 17; 175 Misc. 978.

Jamaica Sav. Bank vs. Bryan, 176 Misc. 215; 25 N.Y.S. (2) 641.

Jonda Realty Corp. vs. Mera Botto, 34 N.Y.S. (2) 301.

*Korsch vs. Lambing, 28 N.Y.S. (2) 167.

Lang vs. Lang, 25 N.Y.S. (2) 775.

McGlynn vs. McGlynn, 35 N.Y.S. (2) 6.

Modern Industrial Bank vs. Z., 177 Misc. 132; 29 N.Y.S. (2) 696.

People ex rel. Rigonlot vs. Byrne (1921) 189 N.Y.S. 916.

Post vs. Thomas (1918) 183 App. Div. 525; 170 N.Y.S. 227.

Re Roossin, 30 N.Y.S. (2) 9.

Weynberg vs. D., 25 N.Y.S. (2) 600.

NORTH DAKOTA

Kosel vs. First National Bank (1927) 55 N.D. 445; 214 N.W. 249.

Olson vs. Gowan-Lenning Brown Co. (1921) 47 N.D. 544; 182 N.W. 929.

OHIO

Akron Auto Finance Co. vs. S., 66 Ohio App. 507; 35 N.E. (2) 585.

Shaffer vs. Shaffer, 42 N.E. (2) 176,

OKLAHOMA

*White vs. Kimerer (1929) 83 Okla. 9; 200 P. 430.

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*See comments infra.

OREGON

Pierrard vs. Hoch, 97 Ore. 71; 191 P. 328.

PENNSYLVANIA

*Craven vs. Vought, 4 Monroe L.R. 11; 58 Montg. 15; 55 York 173.

*Stokes vs. Giarraputo and Son, 42 D. and C. 597.

SOUTH CAROLINA

*Ilderton vs. Charleston Consol. R. Co. (1919) 113 S.C. 91, 101 S.E. 282.

TEXAS

Bassham vs. Evans (1919) Tex. Civ. App., 216 S.W. 446.

Kuehn vs. Neugebauer (1919) Tex. Civ. App., 216 S.W. 259.

WASHINGTON

Gilluly vs. Hawkins (1919) 108 Wash. 79; 182 P. 958.

Greenwood vs. Puget Mill Co. (Wash) 191 P. 393.

WISCONSIN

Konkel vs. State (1919) 168 Wis. 335; 170 N.W. 715.

Justice Becker in speaking for the St. Louis Court of Appeals, *Clark vs. Klene* (1919) 201 Mo. App. 408; 212 S. W. 55, with regard to the "stay" section of the 1918 Act, stated:

> "As we read this section, we are of the opinion that the framers of the Act intended to lodge in the trial court a sound discretion, upon a motion to stay proceedings being filed by a party litigant, to be exercised according to the facts as they may appear in each case."

From actual experience in trial courts, results relayed to your Committee, although not revealed in any reported cases, are such as to show that today the great majority of trial courts are following the spirit of the Act which suggests a liberal granting of "stays" in cases involving those who are giving their all for our country. The following comments will show what the courts have done in the negligence cases taken up for review.

FEDERAL:

H. A. Rothrock was made a co-defendant in a suit for damages resulting from an auto-

mobile collision. He filed a petition to stay proceedings under the Soldiers' and Sailors' Civil Relief Act, and in support of the petition he filed the affidavit of his mother to the effect that he was inducted into the United States Army, and that at the time the petition was filed he was located in the neighborhood of San Jose, California. The court stated that the affidavit made it clear that the defendant was engaged in the military services of the United States, and that:

> "The purpose of the Act (1940) was to suspend enforcement of civil liability in certain cases of absence in military service of the United States, in order to permit such persons to devote their entire energy to the defense needs of the nation and temporarily suspends all legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period therein specified and authorizes the Court in actions pending to stay such proceedings unless in the opinion of the Court the ability of the plaintiff to prosecute the action, or the defendant to conduct his defense is not materially affected by reason of his military service.
>
> "Applying, then, the facts as alleged in these complaints, to the Act, it is evident that the defendant cannot at this time conduct his defense which is materially affected by reason of his military service and therefore under the allegations of the complaints and the showing made, the proceedings in these actions are temporarily suspended, and stayed until such time as provided for in the Act."

Lanham et al vs. Cline (Idaho), 44 F. Supp. 897.

In the case of *Swideraki vs. Moodenbaugh,* (Ore.) 44 F. Supp. 687, a suit was filed to collect damages for injuries resulting from an automobile accident. The defendant was in the military service at the time of the accident. He was released in the Fall of 1941, and suit was filed. He was recalled later to the service, and at the time the petition was filed for a postponement of further action he was located at Camp Ord, California. In reply to this motion for a stay the plaintiff called the attention of the Court to the fact that the defendant was protected by a casualty insurance policy up to $5,000, and offered to agree to limit recovery to that amount. The court stated that it must avoid injury to a soldier devoting himself to the service of his country, and that at the same time it must prevent use of the Act as a shield for the protection of others not so devoted. Even though it was not denied that the defendant was in the service, the court refused to stay the proceedings, holding that the existence of the insurance policy and the offer of the plaintiff to limit the recovery were factors that the court should consider in the exercise of discretion. The opinion in the concluding paragraph contains the following inference that further proceedings might be stayed at some later date:

> "The Court can under the Statute halt the case at any time, whenever manifest injury to the soldier appears."

KENTUCKY:

In the case of *Fennell vs. Frisch,* 192 Ky. 535; 234 S.W. 198, a suit was filed for the death of a fourteen year old pedestrian. In private life the defendant was a contractor. In the service he was a Captain in the Ordnance Department of the Government, and at the time of his trial he was located at Cincinnati, Ohio. His official duties were such that it was possible for him to spend a portion of his time at his home in Newport, Kentucky, and at the time of the accident he was on his way to his Newport office. When the case was called for trial the defendant asked for a continuance based upon the Soldiers' and Sailors' Civil Relief Act. The court refused to grant the motion, and on appeal the Supreme Court stated:

> "The fact that the defendant was a commissioned officer in the army did not of itself compel the court to grant a continuance of the case or to suspend proceedings. We are cognizant of the fact that armistice had been signed more than a year at the time of trial. It does not appear that the purpose of the Act, to wit, the enabling of the United States to more successfully prosecute and carry on the war, was violated or frustrated in any wise; nor that defendant was prevented from devoting his entire energy to the military needs of the nation; nor that the time he found necessary to give to the case interfered in any way with his official or military duties; nor is there any showing that defendant was hindered or prevented from giving to

his defense such attention and preparation as he and his counsel deemed necessary. The courts should and will protect persons engaged in the military service of the country from any loss or injury on account of their absence from the States, or their inability to properly attend to legal proceedings in which they are interested. But where, as in the instant case, the defendant resided in the county where the trial was had, and probably continued to attend to his contracting business, we are satisfied he was accorded full opportunity to prepare his case for trial without the least interruption to or interference with his military duties, and that the circuit judge was within his rights when he overruled the motion to postpone the trial."

NEW HAMPSHIRE:

In the case of *Steinfield vs. Mass. Bonding and Insurance Company,* 80 N. H. 39; 112 Atl. 800, the Supreme Court held that a period of military service should not be included in computing the time during which an action could be brought by or against any person in military service. In this case the plaintiff sued the defendant insurance company on a policy. The policy provided that a suit must be brought within ninety days after payment of loss or expense. The suit was not brought until between four and five months after the payment, but during the period the plaintiff was in the military service of the United States. This decision is not akin to the Stay of Proceedings question being considered herein, but it is included as a case of interest to insurance lawyers. In its opinion the court stated:

"It is manifest that the present case is within the spirit and intent of the Act.*** It was not the legislative intent that the remedial purpose of the Act should be defeated by a narrow or technical construction of the language used."

In the case of *Halle vs. Cavanaugh,* 79 N. H. 418; 111 Atl. 76, the court sustained the right of the husband as an individual to claim the benefit of the Relief Act by virtue of his period of military service. The circumstances were that Mrs. Halle was injured but she died before the suit filed on the claim was tried. The suit was dismissed upon the motion of the defendant for lack of prosecution. The husband, after getting out of the service, attempted to revive the suit. The trial court denied his motion, and on appeal the Supreme Court remanded it for a rehearing, holding that if he was making the attempt as the executor his case was without merit, but that if he was making the attempt as an individual he was entitled to the benefit of the relief Act, and that he had a right to appear and prosecute the suit.

NEW YORK:

In the case of *Griffin vs. Bergh,* 33 N.Y.S. (2nd) 789, the plaintiff was a pedestrian who was injured following a collision at a street intersection. The case was called for trial and the attorney for Silvernail, one of the defendants, informed the court that he was unable to find his client although he had attempted to locate him by telegraph and through his employer. The court insisted upon trying the case, and there was a verdict of $4,000 for the plaintiff. Silvernail read the account of the trial in the paper and reported to his attorney that he was being inducted into the service, and asked the attorney to protect his interests. This decision is of interest because the case started to trial on April 18, 1941, and was completed on Monday, April 21st. Silvernail was not inducted into the army until Monday, April 21st, the day on which the trial was concluded. When the verdict of $4,000 was rendered against the defendant Silvernail a no cause of action verdict was returned in favor of the other two defendants. The trial court vacated the judgment against Silvernail, and set aside the verdict in favor of the co-defendants. The co-defendants appealed, and on appeal the Appellate Division affirmed the proceedings in the lower court.

In the case of *Griswold vs. Cady,* 27 N.Y.S. (2nd) 302, a husband and wife were co-defendants. The husband was in the United States Navy, and the court, with the consent of the plaintiff, stayed the proceedings as to the husband. The trial court denied a motion to stay the proceedings as to the wife, and an appeal was taken. On appeal it was held that:

"Under such circumstances while the husband has a liability as the operator of the car, it is a joint liability herein on the part of both defendants by virtue of the joint ownership of the car. The Court is therefore of the opinion that the case comes within the purview of the Act and accord-

ingly grants a stay as to the defendant Ora E. Cady (the wife), which stay shall be similar in all respects to that granted to the defendant, William H. Cady."

In the case of *Korsch vs. Lambing*, 28 N.Y.S. (2nd) 167, the court sustained the right of the defendant to claim the benefits of the Act, and held that he could not properly defend the action while in the service, as he was a necessary witness to the defense of the action. The opinion does not show that this is an automobile case, but Mr. Lewis C. Ryan, who submitted the report for the State of New York, indicated that he had communicated with the attorneys and had been advised that this action did arise out of an automobile accident.

OKLAHOMA:

In the case of *White vs. Kimerer*, 83 Okla. 9; 200 Pac. 430, the Court upheld the right of the plaintiff to dismiss the action as to one of several co-defendants who was in the service, and by reason thereof entitled to the benefit of the Act, so that the case could be prosecuted against the remaining defendants. The trial court refused to stay the proceedings as to the remaining defendants, and the Supreme Court held that this was not an abuse of discretion.

PENNSYLVANIA:

"Where defendant, who is in the armed forces, is sued on account of his alleged negligence in causing an automobile accident, and where it appears from the record and depositions that he is protected by liability insurance, although there is no evidence of record as to the nature of the policy or the extent of the coverage, the defendant will be given the protection of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. Sec. 501 et seq., and a stay will be granted. In such case, it is immaterial that the defendant has pleaded guilty to operating an automobile while under the influence of intoxicating liquor at the time of the accident, for such criminal record does not necessarily prove his negligence or that the plaintiffs were free from contributory negligence, nor does the criminal record settle the amount of the damages. In such case, it is immaterial that the defendant might be able to obtain a furlough and appear for trial; the stay will nevertheless be granted. In such case, a stay will be granted, in spite of the possibility that plaintiffs may suffer by not being able to prosecute their claims in the courts; the sacrifice is one of those which must be made in war for the common good." Decennial Digest.

Craven vs. Vought, 4 Monroe L.R. 11, 58 Montg. 15; 55 York 173.

"The Soldiers' and Sailors' Civil Relief Act of October 17, 1940, 54 Stat. 1178, Sec. 201, 50 U.S.C.A. App. Sec. 521, does not render invalid the joinder as an additional defendant of a person in military service; it merely provides that under certain circumstances it shall be discretionary with the court on its own motion, or mandatory upon the motion of the person affected or someone in his behalf, to grant a stay of proceedings." Decennial Digest.

Stokes vs. Giarraputo and Son, 42 D. and C. 597.

SOUTH CAROLINA:

The case of *Ilderton vs. Charleston Consolidated Railway and Lighting Company*, 113 S. C. 91; 101 S. E. 282, is a case of great importance to insurance attorneys. In this case the plaintiff was injured by one of the defendant's trolley cars operated by Robert O'Quinn. After the accident and before the case was reached for trial O'Quinn became a member of the United States Army. The defendant asked for a continuance, but this was overruled and the jury returned a verdict in favor of the plaintiff. On appeal the Supreme Court set the judgment aside and granted a new trial. The court in its opinion stated:

"A party ought not to be compelled to go to trial in the absence of the only witness by whose testimony he can make out his action or defense unless it appears that he has been guilty of negligence in procurring the attendance of such witness or in obtaining his testimony."

The court also held that it would be unfair to O'Quinn to permit the case to go to trial in his absence because of the possibility of an action against him under the principles governing liability between principal and agent.

TEXAS:

The case of *Vaughn vs. Charpiot*, 213 S. W. 950, while not a negligence case does involve the right of a party in military service to a Stay of Proceedings. A replevin suit was filed to recover some personal property. A bond was filed and the plaintiff took possession. An answer was filed by the defendant claiming title to the property, and demanding damages for unlawful detention. The case was called for trial when the plaintiff was in the military service of the United States. His attorney made due application for a continuance, and the motion was overruled. The case proceeded to trial, and the defendant was awarded damages for unlawful detention. The case was appealed, and the Court of Civil Appeals held that it was error to allow the case to proceed, and that the motion for a continuance should have been granted.

The Soldiers' and Sailors' Civil Relief Act of 1940 is unique in that it was passed before the start of actual hostilities. Sufficient time has not elapsed to permit a review by appellate courts of many cases involving its provisions. The war effort is an all out effort to maintain democratic institutions, principles, traditions and ideals, and it is reasonable to assume that nothing will be permitted that may directly or indirectly impede such effort. Born in an emergency the Act undoubtedly will be given full force and effect to meet the emergency in granting the relief intended for the men who are serving our nation and humanity.

Respectfully submitted,
FLETCHER B. COLEMAN, Chairman
FORREST A. BETTS
MURRAY G. JAMES
LESLIE P. BEARD
MART BROWN
LEWIS C. RYAN
H. H. SCHOEPP
H. L. SMITH
F. B. BAYLOR.

Supplemental Report of The Committee on Practice And Procedure

ATTENTION is directed to the report of this committee to be found in the Insurance Counsel Journal for July, 1942, at page 28. Since there was no meeting of the Association and therefore no round table discussion, the Chairman desires to make this supplemental report. The Committee has found several places in the rules of Federal Procedure, Nos. 1 to 37 inclusive, where amendments will clarify. In the main, these resolve themselves into the advisability of amending Rule 14 with regard to third party practice, which practice seems to have gotten beyond the limits of the intention of the original drafters and is involved in a maze of conflicting judicial interpretations: Rule 34 respecting discovery, under which some of the courts have held the opposition entitled to review confidential statements and reports in advance of trial, and in opposition to the amendment of Rule 12 with regard to motions to the pleadings and bills of particulars. There appears to be a movement on foot to abolish both motions and bills of particulars, a move which we believe the majority of practicing lawyers would oppose. (See article by Hon. Charles E. Clark, of the U. S. Circuit Court of Appeals, second circuit, appearing in August, 1942 edition of the American Bar Association Journal, at pages 521, 524.)

The Standing Committee on Jurisprudence and Law Reforms of the American Bar Association in its 1942 report, adopted the following resolution:

"Resolved, that the continuing Advisory Committee on Rules of Civil Procedure for the District Courts of the United States, created by Supreme Court Order of January 5, 1942, should periodically survey the functioning of the Federal Rules; to that end should invite suggestions and criticism from the American Bench and Bar, meet at least annually to consider the functioning of the Federal Rules and to determine whether amendments are desirable, and make a formal report to the court at the opening of each term of the court (or at such other time as the court may direct) of the result of its survey, together with amendments, if any, recommended by it."

It thus appears that amendments to the Rules will be proposed and we suggest that the members of this Association, all of whom are practicing attorneys being met with actual trial practice constantly, take some interest in shaping up those amendments which appear to be desirable and opposing those amendments which appear to be undesirable.

It has been the pleasure of the chairman of this Committee to also serve, during the last year, as Chairman of the Insurance Practice and Procedure Committee of the American Bar Association. At the round table of that Committee, held at the American Bar Association Convention at Detroit, August 25, 1942, several papers of interest and value to the members of this association were read, and Mr. Chase Smith has approved the proposal of your Chairman that those papers be reproduced in the Insurance Counsel Journal for the benefit of the members of this Association.

We therefore append to this report the following addresses given at that time, and the same will be printed in the Journal from time to time as space permits:

Address on the subject "Soldiers' and Sailors' Civil Relief Act of 1940" by J. A. Gooch of Dallas, Texas.

Address by Hon. Alexander Holtzoff, Special Assistant to the Atorney General of the United States, on the subject, "Desirability of Amending the Federal Rules of Civil Procedure."

Address on "Third Party Practice" by L. J. Carey of Detroit, Mich.

Address entitled "Comments on Rule 34 and Suggested Amendment Thereto" by Walter O. Schell of Los Angeles, Calif.

Address on "Amendment and Bills of Particulars Under Rule 12" by H. L. Smith of Tulsa, Okla.

It is anticipated that more articles on the rules will follow. The suggestions and comments of the members of this Association on the necessity and desirability of amending the Federal Rules of Civil Procedure will be appreciated, and if any such the members have, will they kindly address them to the Chairman of this Committee.

Respectfully submitted,

WILBUR E. BENOY, *Chairman*
CHARLES H. GOVER
CLARENCE W. HEYL
LON HOCKER, JR.
LEO T. KISSAM
WILLIAM G. PICKREL
PRICE H. TOPPING
F. G. WARREN
PAT H. EAGER, JR., Ex Officio

End